No. 72-634

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES CIVIL SERVICE COMMISSION, ET AL.,
APPELLANTS

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO, ET AL.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR THE APPELLEES

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---

BRIEF FOR THE APPELLEES

QUESTION PRESENTED

Whether the prohibition of Section 9(a) of the Hatch Act against federal employees' taking "an active part in political management or in political campaigns" (as statutorily defined by reference to pre-1940 determinations of the Civil Service Commission) is so vague and overbroad as to be invalid on its face under the First Amendment's guarantees of free speech and association.

STATUTES AND REGULATIONS INVOLVED

(1) Section 9(a) of the Hatch Act of August 2, 1939, 53 Stat. 1147, 1148, was codified into positive law without substantive change by Public Law 89-554 of September 6, 1966, 80 Stat. 378, 525, and the sentence of that section challenged here now appears at 5 U.S.C. § 7324(a)(2). For simplicity in this brief, it will be referred to throughout as Section 9(a). Section 9(a), as amended by the Act of July 19, 1940, 54 Stat. 767,[1] read in its entirety (the single sentence challenged here appearing in boldface):

> Sec. 9. (a) It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. **No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns.** All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of this section the term "officer" or "employee" shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations

[1] This has been the only substantive amendment to Section 9(a). It added the words "and candidates" at the end of the third sentence.

with foreign powers or in the Nation-wide administration of Federal laws.

(2) Section 15 was added to the Hatch Act by the Act of July 19, 1940, 54 Stat. 767, 771. As codified into positive law by Public Law 89-554 of September 6, 1966, 80 Stat. 378, 525 it appears at 5 U.S.C. § 7324(a) and reads in its entirety:

> For the purpose of this subsection [7324(a)(2)], the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

(3) Section 18 was added to the Hatch Act by the Act of July 19, 1940, 54 Stat. 767, 772. As codified into positive law by Public Law 89-554 of September 6, 1966, 80 Stat. 378, 526, it appears at 5 U.S.C. § 7326 and reads in its entirety:

> § 7326. Nonpartisan political activity permitted
>
> Section 7324(a)(2) of this title does not prohibit political activity in connection with—
>
> (1) an election and the preceding campaign if none of the candidates is to be nominated or elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected; or
>
> (2) a question which is not specifically identified with a National or State political party or political party of a territory or possession of the United States.

For the purpose of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with a National or State political party or political party of a territory or possession of the United States.

(4) 5 C.F.R. § 733.111:

(a) All employees are free to engage in political activity to the widest extent consistent with the restrictions imposed by law and this subpart. Each employee retains the right to—

(1) Register and vote in any election;

(2) Express his opinion as an individual privately and publicly on political subjects and candidates;

(3) Display a political picture, sticker, badge, or button;

(4) Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization;

(5) Be a member of a political party or other political organization and participate in its activities to the extent consistent with law;

(6) Attend a political convention, rally, fundraising function; or other political gathering;

(7) Sign a political petition as an individual;

(8) Make a financial contribution to a political party or organization;

(9) Take an active part, as an independent candidate, or in support of an independent candidate, in a partisan election covered by § 733.124;

(10) Take an active part, as a candidate or in support of a candidate, in a nonpartisan election;

(11) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

(12) Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by State or local law; and

(13) Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency.

(b) Paragraph (a) of this section does not authorize an employee to engage in political activity in violation of law, while on duty, or while in a uniform that identifies him as an employee. The head of an agency may prohibit or limit the participation of an employee or class of employees of his agency in an activity permitted by paragraph (a) of this section, if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interests.

(5) 5 C.F.R. § 733.122:

(a) An employee may not take an active part in political management or in a political campaign, except as permitted by this subpart.

(b) Activities prohibited by paragraph (a) of this section include but are not limited to—

(1) Serving as an officer of a political party, a member of a National, State, or local committee of a political party, an officer or member of a committee of a partisan political club, or being a candidate for any of these positions;

(2) Organizing or reorganizing a political party organization or political club;

(3) Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose;

(4) Organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a partisan candidate, political party, or political club;

(5) Taking an active part in managing the political campaign of a partisan candidate for public office or political party office;

(6) Becoming a partisan candidate for, or campaigning for, an elective public office;

(7) Soliciting votes in support of or in opposition to a partisan candidate for public office or political party office;

(8) Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or partisan candidate;

(9) Driving voters to the polls on behalf of a political party or partisan candidate;

(10) Endorsing or opposing a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature, or similar material;

(11) Serving as a delegate, alternate or proxy to a political party convention;

(12) Addressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office; and

(13) Initiating or circulating a partisan nominating petition.

STATEMENT

The National Association of Letter Carriers, AFL-CIO, six local Democratic and Republican committees, and six individual federal employees subject to Section 9(a) of the Hatch Act, 5 U.S.C. § 7324(a)(2) (sometimes herein collectively called the "Letter Carriers") brought this action challenging the constitutionality of the political activity prohibition of that section. They filed the suit on their own behalf, on behalf of all members of the organizational plaintiffs, and on behalf of all employees subject to the political activity prohibition of the Hatch Act.

The complaint (App. 3-11) alleged that members of the class represented by plaintiffs either had engaged in, or desired to engage in, conduct within Section 9(a)'s prohibition against taking "an active part in political management or in political campaigns" and accordingly were subject to enforcement or threats of enforcement to the detriment of their rights of free speech and association. (App. 6-11).

A three-judge district court was convened pursuant to 28 U.S.C. §§ 2282, 2284, to hear and determine plaintiff's application for an injunction restraining the enforcement of Section 9(a)'s prohibition for repugnance to the Constitution. All three judges agreed that plaintiffs adequately represented all federal employees subject to Section 9(a)[2] and certified that the suit was maintainable as a class action under Rules 23(b)(1) and (b)(2), FEDERAL RULES OF CIVIL PROCEDURE. (J.S. 1a, n. 1, 22a). The three judges also

[2] The court rejected plaintiffs' claim to represent state employees subject to an identical prohibition at 5 U.S.C. § 1502(a)(3). (J.S. 1a n.1, 19a-23a). Hence, the constitutionality of that provision is not directly presented by this case.

agreed that the National Association of Letter Carriers and certain individual plaintiffs, and the class they represented, had a direct interest in challenging Section 9(a)'s constitutionality and that their complaint presented a justiciable case and controversy (J.S. 1a, n. 1, 4a, 15a, n. 1, 20a-22a). Neither of these holdings is challenged here.

The district court then held, one judge dissenting, that Section 9(a)'s political activity prohibition was unconstitutional, "in that its provisions are impermissibly vague and overbroad when measured against the requirements of the First Amendment to the Constitution." (J.S. 14a). The court granted an injunction against enforcement but, *sua sponte,* stayed its order pending review by this Court. (*Ibid.*).

SUMMARY OF ARGUMENT

The district court held that the constitutional barrier to vague and overbroad statutes restricting the exercise of First Amendment rights requires invalidation of Section 9(a) of the Hatch Act insofar as it prohibits approximately 2.8 million federal employees (App. 154), on pain of dismissal, from taking "an active part in political management or in political campaigns." Section 15 of the Act defines the proscribed conduct as those acts which, before July 19, 1940, had been prohibited "by determinations of the Civil Service Commission under the rules prescribed by the President."

Twenty-six years ago, in *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947), a narrow 4-3 majority of this Court sustained a particular application of Section 9(a) but explicitly reserved consideration of

Section 15 (330 U.S. at 103-04). *Mitchell* upheld Section 9(a) only insofar as it prohibited a roller at the Philadelphia mint from serving, during off-duty hours, as a ward executive committeeman and, on election day, "as a worker at the polls and a paymaster for the services of other party workers." (330 U.S. at 94).

Unlike *Mitchell,* this case presents a justiciable challenge to the entire range of political activities comprehended in Section 15. It squarely presents questions of vagueness and overbreadth under the First Amendment's guarantees of free speech and association which the Government concedes (J.S. 9) the *Mitchell* opinion did not explore. Thus, what was left open by *Mitchell* for further examination is now directly presented for decision.

The Hatch Act's laudable objective of insuring efficient and even-handed conduct of public business free from politically-motivated official coercion cannot insulate Section 9(a) from judicial inquiry to determine whether, on its face, the statute is overbroad or void for vagueness. It has been an enduring precept of this Court that statutes restricting the exercise of First Amendment rights of expression and association cannot be so vague as to be uncertain in their application. This is particularly true where, as here, the First Amendment rights involved have their "fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272 (1971). In case after case the Court has made clear that "broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button,* 371 U.S. 415, 438 (1963).

Section 9(a) of the Hatch Act does not merely r
strict fundamental political rights as a peripheral
incidental matter. The central purpose of its politic
activity prohibition is to regulate and limit the exe
cise of our most basic freedoms, political speech an
association. The importance of the robust politic
self-expression so sharply limited by the Act mak
its vagueness and overbreadth especially malignant.

The political activity prohibition of Section 9(a
however construed, bars millions of federal employe
from engaging in a wide and ill-defined range of publi
affairs activities that are "more than self-expression"
they are indeed "the essence of self-government.
Garrison v. *Louisiana,* 379 U.S. 64, 75 (1964). Th
irony of Section 9(a) is that the more effectively a
employee expresses his opinion on political subjects
candidates, a right expressly preserved by Section 9(a
the more likely he is to be caught in the trap of th
political activity prohibition.

Although the Government formulates the "Questio
Presented" as the constitutionality, *on its face,* of th
Hatch Act's political activity prohibition, the Gover
ment then proceeds to sidestep that question. It pr
sents no defense of Section 9(a) as *Congress* wrote i
but only of the statute "as construed" by the Civ
Service Commission in a regulation issued in 197
more than 30 years after the statute's enactment. (
C.F.R., Part 733). Moreover, even this regulatio
neither clarifies the statute's impermissible vaguene
nor narrows its excessive breadth.

For example, the Hatch Act's ban on "solicitin
votes" leaves an employee possibly, but not certainl

vulnerable to dismissal where the "solicitation" consists merely of telling another voter which candidate the employee favors. Despite the statutory and regulatory exception permitting an employee to express his opinion as an individual, publicly and privately, on political subjects and candidates, any communication by an employee on this subject might be treated by the Commission as having the forbidden effect of soliciting votes. With such an uncertain line between permitted and prohibited conduct, a prudent employee who wants to keep his job will say nothing. The vagueness of the statute thus operates to produce self-censorship, perhaps the most pernicious and least remediable form of abridgment of speech.

No efforts by the Government to impose order on Section 15's chaotic incorporation-by-reference can solve the worker's dilemma. When a statute talks in riddles, as the district court aptly described Section 9(a)'s enigmatic ban (J.S. 13a), any impulse of an employee toward political self-expression is inevitably "chilled," if not suppressed. Whether he resorts to the statutory language, the Civil Service Commission's regulations, its list of "do's" and "don't's", or the more than 3,000 prior determinations of the Commission (incorporated into Section 9(a) by Section 15, but never available to the public), he is confronted with overlapping, inconsistent, unascertainable and incomprehensible guides to action. The resulting uncertainty coerces the ordinary, prudent federal employee to remain silent where, as a citizen, he may wish—and in a democratic society should be encouraged—to speak and robustly debate.

The Government's heavy burden of justifying infringements on First Amendment rights is not light-

ened by the Act's application to government employees alone, whose ranks have swelled to the millions. The need for efficient, impartial conduct of public business may provide a rationalization for political restrictions otherwise plainly invalid, but these restrictions must still be judged by the same constitutional standards as other infringements of political rights. *Perry* v. *Sindermann,* 408 U.S. 593 (1972). The well-established principles against vague and overbroad restrictions on First Amendment rights, reaffirmed only last Term in such cases as *Dunn* v. *Blumstein,* 405 U.S. 330 (1972), and *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972), require affirmance of the district court's holding that the political activity prohibition of Section 9(a) is unconstitutional.

ARGUMENT

Introduction

In any hierarchy of personal freedoms secured by the Bill of Rights, none stands higher than the particular First Amendment rights here sought to be vindicated, namely, the right to speak out on public issues, to assemble peaceably, to discuss politics and to participate in the essential processes of democracy. To prohibit any citizen from taking "an active part in political management or in political campaigns"[3] is directly to prohibit his expression and association.

The Letter Carriers do not challenge—indeed, they wholeheartedly support—the Hatch Act's readily severable prohibitions against activities that are not protected by the Constitution, such as misuse of official

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[3] "It can hardly be doubted that the constitutional guaranty has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272 (1971).

authority, coercion, or intimidation for political or any other purposes.[4] See T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 590 (1971 ed.).

The Hatch Act's restriction of speech and association is frontal and direct, not peripheral or incidental. *Cf. Cohen* v. *California,* 403 U.S. 15 (1971); *Street* v. *New York,* 394 U.S. 576 (1969); *Cox* v. *Louisiana,* 379 U.S. 559 (1957). Section 9(a)'s political activity prohibition restrains straightforward, verbal and written communication of political ideas, peaceable assembly, and political association. It does not simply *regulate* or *burden* protected conduct, *cf., Healy* v. *James,* 408 U.S. 169, 181-183 (1972); *Bates* v. *City of Little Rock,* 361 U.S. 516, 523 (1960); it absolutely *forbids* many significant forms of speech and association. In short, it cuts across, and cuts off, the exercise by millions of public employees of the most basic rights protected by the First Amendment.[5]

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[4] *E.g.,* 5 U.S.C. § 7321; 5 U.S.C. § 7324(a)(1); 18 U.S.C. ch. 29; for a review of these unchallenged prohibitions, see Civil Service Commission Pamphlet 20, Pt. VIII (May 1966), reprinted at App. 31-37.

[5] That the Act is administered so as to forbid many forms of speech and association is evident from Civil Service Commission Pamphlet 20 (May 1966), which describes the purpose of Section 9(a) as being:

> ". . . to *prevent* those subject to it from *assuming* general political leadership or from *becoming* prominently indentified with any political movement, party, or faction, or with the success or failure of any candidate for election to public office." (App. 22) (Emphasis added).

The only way to *assume* leadership or to *become identified* with a movement, party or faction, particularly one peacefully seeking or resisting political change, is to exercise those forms of speech, assembly and petition that were the central concern of the framers of the Bill of Rights. No other activities lead to the result which the Commission says Section 9(a) is designed to prevent.

The "transcendent value to all society of constitutionally protected expression" has led this Court to apply especially rigorous tests for judging legislation that restricts such expression and association. *Gooding* v. *Wilson*, 405 U.S. 518, 521 (1972). The basic question presented here is whether the political prohibition of Section 9(a) meets these basic, accepted constitutional tests.[6]

I. PUBLIC EMPLOYEES ARE ENTITLED TO HAVE IMPAIRMENT OF THEIR FIRST AMENDMENT RIGHTS SUBJECTED TO STRICT OVERBREADTH AND VOID-FOR-VAGUENESS SCRUTINY.

The Hatch Act's prohibition against active political management and campaigning cannot be judged against any relaxed constitutional standard simply because its application is limited to millions of government employees.

In recent years this Court has consistently held that persons do not shed their constitutional rights to free-

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[6] *First*, that Congress recognized and carefully considered the full array of rights of political expression and association embraced within Section 9(a)'s prohibition against active political management and campaigning;

Second, that after such consideration, Congress justifiably concluded that specific, identifiable and paramount public interests required Section 9(a)'s broad restriction of the exercise of such rights by government employees;

Third, that the sweeping restriction chosen by Congress represents no greater interference with First Amendment rights than is necessary to protect identified, incompatible, and paramount public interests; and

Fourth, that the statute clearly and unambiguously informs employees subject to it of what forms of expression and association are prohibited and what forms remain permitted.
E.g., Grayned v. City of Rockford, 408 U.S. 104 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972).

dom of speech or association when they enter public service. *E.g., Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Shelton* v. *Tucker*, 364 U.S. 479 (1960). These cases have repudiated the "hoary epigram from the pen of Mr. Justice Holmes"[7] that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[8]

Yet, this epigram, and the judicial universe it mirrored, underlay this Court's use in *United Public Workers* v. *Mitchell, supra,* 330 U.S. 75 (1947), and in *Oklahoma* v. *Civil Service Comm'n.*, 330 U.S. 127 (1947), of the "rational relationship" test to validate the Hatch Act's recognized (330 U.S. at 94-95) interference with the exercise of First Amendment rights by government employees:[9] "It is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." 330 U.S. at 101.

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[7] *Hobbs* v. *Thompson*, 448 F.2d 456, 473 (5th Cir. 1971).

[8] *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892). See Van Alystyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *Civil Disabilities and the First Amendment*, 78 YALE L. J. 842 (1969); The Supreme Court, 1966 Term, 81 HARV. L. REV. 69, 170 (1967).

[9] See also 330 U.S. at 99, where the Holmes epigram is quoted in a footnote to the sentence immediately preceding the Court's statement that:

> "Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection."

Insofar as the *Mitchell* and *Oklahoma* decisions condone abridgment of First Amendment rights of Government employees under the lenient "rational relationship" test ordinarily applied to economic regulation, they have been repudiated by more recent and consistent decisions of this Court.[10] The district court so found (J.S. 13a), as did the Fifth Circuit in *Hobbs* v. *Thompson, supra* n. 7.[11] Yet, the Government continues to rely on *Mitchell* and its discarded measure of acceptable infringements on free speech, urging that:

> "In view of the important objectives that Congress sought to attain by this legislation, it was, as this Court held in *United Public Workers* v. *Mitchell*, . . . well within the range of reasonable and permissible choices open to Congress to select a prophylactic approach . . . ." (Brief, 13).

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[10] This case does not, however, require full-scale reconsideration of the *Mitchell* and *Oklahoma* cases. In *Mitchell*, the Court held that the Congress could forbid a government employee from engaging in particular, identified political activity. That power of Congress is not challenged here, because Congress has never, prior to passage of Section 9(a), conducted the inquiry which might validate particular prohibitions against political activity. Until Congress (a) considers the full range of impairment of First Amendment rights that will result from its action, (b) finds certain impairments necessary, and (c) legislates clearly and in the least restrictive manner, the nature and extent of the Government's need for a blanket prohibition will remain unknown. The *Oklahoma* case was limited to upholding the authority of Congress to regulate the conduct of state employees whose salary is federally funded. That issue is not present here. (See *supra*, at 7, n.2).

[11] *Accord*, Mancuso v. Taft, 341 F. Supp. 574 (D.R.I.), *appeal docketed*, No. 72-1180, 1st Cir. (May 23, 1972); Fort v. Civil Service Commission, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Reptr. 625 (1964); Minielly v. State, 242 Ore. 490, 441 P.2d 69 (1966); Huerta v. Flood, 103 Ariz. 608, 447 P.2d 866 (1968); DeStefano v. Wilson, 96 N. J. Super. 592, 233 A.2d 682 (Super. Ct. 1967).

Such wholesale deference to the legislature would, as the Fifth Circuit observed, make strict overbreadth and void-for-vagueness inquiry impossible. *Hobbs* v. *Thompson, supra* n. 7, 448 F.2d at 472.

First Amendment rights of public employees may collide with the Government's legitimate interest in efficient, even-handed conduct of its business. Yet, countervailing governmental concerns, of undetermined proportions, do not give Congress *carte blanche* to enact an imprecise and sweeping abridgment of First Amendment rights. Rather, the government employer-employee relationship—and the important public obligations of public employees—represent no more than an assertible source of justification for precisely drawn and otherwise valid regulation of speech and association. Even when the Congress justifiably concludes that some such regulation is demanded by overriding public interests—*as it has not done here*—the Constitution still requires Congress to take the least restrictive approach to achieve the identified ends and to express any restriction of First Amendment rights with precision and clarity.

II. THE POLITICAL ACTIVITY PROHIBITION OF SECTION 9(a) IS, ON ITS FACE, VOID FOR VAGUENESS.

The district court held that the single sentence of the Hatch Act which prohibits federal employees from taking "an active part in political management or in political campaigns," as defined by Section 15's incorporation-by-reference of some 3000 prior administrative determinations, is so vague as to be unconstitutional on its face. The district court found that "no one can read the Act and ascertain what it prohibits."

(J.S. 7a). More than a quarter century earlier, Mr. Justice Black made the same observation:

> "[W]hat federal employees can or cannot do, consistently with the various civil service regulations, rules, warnings, etc., is a matter of so great uncertainty that no person can even make an intelligent guess. This was demonstrated by the government's briefs and oral arguments in this case." *United Public Workers* v. *Mitchell, supra,* 330 U.S. 75, 105, 110 (Black, J., dissenting).

The Government here states the "Question Presented" as "whether the prohibition of the Hatch Act against federal employees taking 'an active part in political management or in political campaigns' is unconstitutional *on its face.*" (Brief, 2) (Emphasis added.) Yet, nowhere in its brief does the Government address this question. Not even suggesting that the statute can stand on a reading of its own words,[12] the Government defends the Act only "as authoritatively construed by the Commission." (Brief 12). Before reaching that limited defense, the Court first must determine whether *Congress* satisfied the mandate of the First Amendment.

A. SECTION 9(a): ITS PROHIBITION AND LEGISLATIVE EXCEPTIONS.

In 1939, when Congress first prohibited federal employees from taking "an active part in political management or in political campaigns," it showed sufficient concern about the breadth and ambiguity of its lan-

[12] *Cf. Oestereich* v. *Selective Service Board,* 393 U.S. 233, 238 (1968).

guage as to carve out two specific exceptions, which it included in the original Section 9(a):

> *First,* covered employees "shall retain the right to vote as they may choose . . . ."
>
> *Second,* covered employees "shall retain the right . . . to express their opinions on all political subjects."

A year later, when Congress amended the Hatch Act, it apparently still deemed the political activity prohibition either so unnecessarily broad or so unclear as to add to it: (a) the unusual and complex definition of Section 15, (b) the expansion of the second exception quoted above to include "candidates",[18] and (c) a third exception in Section 18, permitting certain, limited "non-partisan" activity and "partisan" activity in connection with constitutional amendments, referendums, and like questions. (Section 18 is set out in full at p. 7 *supra.*)

While designed to limit Section 9(a)'s political activity prohibition, these three exceptions underscore its fundamental ambiguities and lack of other limitations. They invite questions as to what, if any, limits there would be on the scope of Section 9(a)'s prohibition in their absence, and their presence fails to impart the clarity required for a statute regulating conduct protected by the First Amendment.

Did the Congress in 1939 include the voting rights exception as part of Section 9(a) because it recognized that, without it, a person of ordinary intelligence might reasonably read the political activity prohibition to

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[18] Section 2 of the Act of July 19, 1940, 54 Stat. 767, now codified at 5 U.S.C. § 7324(b).

forbid voting? What other genuine statutory purpose does this exception serve?

Would the prohibition of Section 9(a), absent its second exception permitting expression of opinion, forbid all expression of opinion on "political subjects and candidates"? Does this exception permit a federal employee to express his opinion on any political subject or candidate regardless of circumstances, audience, or content? If not, where, how, and by whom are lines to be drawn between expression of opinion, which is permitted, and "soliciting votes in support of or in opposition to a partisan candidate . . . .", which the Commission has found to be prohibited? 5 C.F.R. § 733.122(b)(7). Does the face of the statute provide the answers to these questions directly affecting constitutional rights of millions of citizens? Obviously not.

The Government represents that "a government employee at a social gathering can *freely* express his political opinions to others present . . . ." (Brief, 48) (Emphasis added.) One of the most prevalent forms of political campaigning today is the neighborhood or block party at a private home. Does the Government mean to say that an employee may attend such a party and "*freely* express his political opinions to others present"?

Does Section 9(a)'s prohibition against taking "an active part in political management or in political campaigns," on its face, give adequate notice to an employee that he retains his right to freely express political opinions at social gatherings, as the Government represents he may safely do? Is this freedom without limit? Does the right to express political opinions at social gatherings include the right to solicit votes for

or against a candidate? When does a social gathering become part of an organized political campaign? What if the host or hostess solicits votes or contributions for a partisan candidate? What if the host is a partisan candidate's campaign manager? What if a partisan candidate's campaign manager is an invited guest? And what if that manager uses the gathering as an occasion to solicit votes or contributions? In such circumstances, does the legality of the employee's expression hinge upon his awareness of the campaign manager's position and purpose? Can an employee ascertain the correct answers to the foregoing questions from the face of Section 9(a)? Obviously not.

Any attempt, such as the Government makes (Brief, 38), to apply the canon of construction that specific provisions overcome more general ones encounters the difficulty of determining which has more specificity: the prohibition against active political participation or the exception purporting to permit expression of opinion on political subjects and candidates. Any doubts as to whether the prohibition or the exception applies in a particular situation would have to be resolved by a prudent, conscientious employee in favor of the prohibition. See *Dalehite* v. *United States,* 346 U.S. 15, 31 (1953); *United States* v. *Dickson,* 15 Pet. (40 U.S.) 141, 165 (1841) (Story, J.). The result is self-censorship of protected speech and association. The statute's vagueness increases its "chilling effect," inevitably leading federal employees to "steer far wider of the unlawful zone." *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958), quoted in *Grayned* v. *City of Rockford, supra,* 408 U.S. at 109.

The foregoing questions, and the many other ambiguities inherent in Section 9(a)'s language, are not

"confined to a relatively few uncommon or borderline situations," as the Government suggests. (Brief, 52). These questions are not rhetorical or academic, but directly affect the daily conduct of millions of citizens engaged in the public service. This case challenges the constitutionality, not the grammar, of an Act of Congress. *Cf. Cole* v. *Richardson,* 405 U.S. 676, 684 (1972). Section 9(a)'s prohibition is infected with uncertainties that broadly inhibit exercise of the most basic rights of political expression and association. The district court saw how thoroughly Section 9(a)'s ambiguities stifle constitutional freedoms: "In the end everything may appear political, all speech may intend to influence, and conformity is imposed in the fashion of more regimented, less democratic governments." (J.S. 10a).

The Government's failure to defend Section 9(a) on its face constitutes an implicit concession that it can be saved, if at all, only by the legislative definition contained in Section 15, considered together with administrative interpretations, which we now consider, in turn.

B. SECTION 15's DEFINITION, INCORPORATING BY REFERENCE PRIOR ADMINISTRATIVE DETERMINATIONS.

In 1940, Congress enacted Section 15 of the Hatch Act to define the political activity prohibition of Section 9(a). (Act of July 19, 1940, 54 Stat. 767, 771). As codified into positive law by Public Law 89-554 of September 6, 1966, 80 Stat. 378, 525, Section 15 now appears at 5 U.S.C. § 7324(a) and reads in its entirety:

> For the purpose of this subsection [7324(a)(2)], the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning

which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

I. Section 15 Incorporated All Pre-1940 Political Activity Rulings Filed with the Court.

The statutory referent of Section 15 could conceivably be either:

(a) the 3,000-odd Commission determinations in all individual pre-1940 cases,[14]

(b) some undefined and unknown subset of (a) above which were "in effect" on July 19, 1940,

(c) the 1939 edition of the Commission's pamphlet on political activity (C.S.C. Form 1236) (App. 89-116), or

(d) a card prepared by Senator Hatch and entered on the Congressional Record which listed 18 very general categories of prohibited political management and campaigning. 86 CONG. REC. 2943 (1940).

Any and all of these possibilities compound the inherent ambiguities of Section 9(a)'s prohibition.

The plain language of the statute, the legislative history, and thirty years of administrative construction by the Commission support the first possibility, *i.e.*, that Section 15 refers to all of the thousands of

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[14] The first time that these determinations ever were collected and made available outside of the Commission's archives was in response to an order of the district court in this case (App. 53). The Government has filed ten sets for review by this Court. (Brief, 41 n. 14). The pre-1940 determinations are not included in the bound three-volume *Political Activity Reporter*, ten copies of which the Government also has filed. (Brief, 71 n. 5).

individual pre-1940 Commission determinations. For purposes of determining the statute's vagueness *vel non*, the "in effect" limitation, which distinguishes the first possibility from the second, is meaningless since prior to that date the Commission never overruled a single determination, and subsequent thereto the Commission has never sought to identify which determinations were effective on July 19, 1940. It must be concluded either that Section 15 incorporates all of the determinations which the Government filed with the district court here or else that even the Government does not know which of those are incorporated and which are not. (We suggest that even a casual inspection of this bulky material, which has been filed with this Court, will accentuate vividly the problems of ascertaining what the statute does or does not prohibit.)

Both the majority and dissenting judge below read Section 15 as incorporating all of the thousands of prior Commission rulings which the Government filed in this case. The district court said that Section 15 "incorporates by reference over 3,000 rulings made by the Commission between 1886 and 1940." (J.S. 4a). The dissenting judge found, even more emphatically, that "it is, of course, true that Section 15 incorporated the decisions themselves and not Form 1236's summary of their holdings . . . ." (J.S. 38a).

(a) The Commission's Consistent Administrative Interpretation

Over the years, the Commission uniformly has taken the position that *all* determinations "in effect" on July 19, 1940, constitute the definitional referent of Section 15. *E.g., Massingham,* 1 P.A.R. 792, 795 (1959); *Smith,* 1 P.A.R. 222, 223, 229 (1947); *Floyd,* 1 P.A.R. 145, 152 (1947); *Shivy,* 2 P.A.R. 293, 296 (1947); see Rose, *A*

Critical Look at the Hatch Act, 75 HARV.L.REV. 510, 517-22 (1962). Until it took the contrary litigation posture in this case, the Commission never expressed any other view of Section 15.

Perhaps the best exposition of the Commission's understanding of Section 15 is set out in a 1949 analysis and selected compilation of Hatch Act cases prepared by a long-time Commission hearing examiner:

> "So, if in Sections 9 and 12 of the Hatch Act Congress had simply prohibited those subject thereto from taking 'any active part in political campaigns,' there always would have remained an opportunity for logically reasoned conflicting arguments as to what falls within the scope of the prohibition. But Sec. 15 of the Hatch Act makes for inflexibility in interpretation, establishing what may be considered a mandatory principle of *stare decisis* .... Thus, as the Commission has often had occasion to say . . ., Congress gave the then effective determinations of the Commission the force of law.
>
> "Interested persons, therefore, may ask, 'How are we to know what the determinations of the Commission were, as of the date of enactment of Sec. 15?'
>
> * * *
>
> "The public cannot go to original sources to study the Commission's pre-Hatch Act determinations, because they are embodied in diffused files and records of the Commission ....
>
> "One way—perhaps the best—of arriving at the answer is through this volume . . . ." J. IRWIN, HATCH ACT DECISIONS OF THE UNITED STATES CIVIL SERVICE COMMISSION, 39-40 (1949).

In 1967, the Commission reiterated that the individual pre-1940 rulings were incorporated by Section

15, not merely a summary. At that time, the Commission criticized the inflexibility and rigidity that Section 15 imposed upon its regulatory efforts, declaring that:

> "Changes in the prohibitions of the law are difficult to accomplish under the existing statute. The present language tends to bind the Commission to its pre-1940 precedents. We feel this is no longer desirable or justifiable." [15]

In 1971, the Commission once again reaffirmed this view of Section 15 when it published the first purported "index" of its pre-1940 determinations.[16] That "index," which is not readily available to the ordinary employee, does no more than classify the thousands of pre-1940 rulings by such uninformative headings as "condoning activity," "engaging in activity by indirection," "making remarks and statements," and "preparing literature." It does not report, or even digest, the rulings themselves. The introduction to the "index" sets out the Commission's position as to the continuing significance of the cases cited therein:

> "All of the cases were decided by the Commission in the years 1886-1940. These 'rule decisions' were incorporated into the Hatch Act by the addition of section 15 of the Act through the 1940 amendments thereto (54 Stat. 767)." (1 P.A.R. i).

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[15] From Civil Service Commission Chairman John W. Macy's statement to the Commission on Political Activity of Government Personnel (hereinafter referred to as "CPA"), 3 CPA REPORT, 12, 17 (1967). Chairman Macy was accompanied by the other two members of the Commission, both of whom endorsed his statement. *Id.*, at 24. One of these commissioners is now Chairman, and the other still serves on the Commission.

[16] That index is contained in volume 1 of the Commission's *Political Activity Reporter*, ten copies of which have been filed with the Court. (Brief, 71 n.5) (hereinafter cited as "P.A.R.").

All of the determinations filed with the district court are included in the index; yet, some other unknown numbers of pre-1940 rulings were omitted from the "index" and were not filed with the court because their precedential value was "negligible." (*Ibid.*)

Just last year, the Commission's General Counsel repeated the position that Section 15 incorporated the individual pre-1940 rulings, rather than a summary, testifying before a Senate Committee that, "with the line the Congress drew in terms of party management and political campaigning, the definitions in some 4,000 [sic] cases that have been decided since 1886 are what they are." *Hearings on the Hatch Act Before the Senate Post Office and Civil Service Committee,* 92d Cong. 2d Sess. 62 (1972).[17]

(b) The Legislative History

There were no congressional hearings on Section 15, either as originally reported out of committee, when

[17] In 1966, the Congress enacted a law creating a twelve-member commission to study political activity of government employees and to report back in a year. Public Law 89-617 of Oct. 3, 1966, 89th Cong. 2d Sess., 80 Stat. 868. This "Commission on Political Activity of Government Personnel" (sometimes hereinafter referred to as "CPA") included two Senators, two members of the House, two administration officials, and six public members, and included three former chairmen of the Civil Service Commission (1 CPA REPORT, 65-66). It was chaired by Arthur S. Flemming, formerly Secretary of Health, Education and Welfare, and a former chairman of the Civil Service Commission. After a year's study of the Hatch Act, this Commission concluded:

> "The Hatch Act, in a single sentence, sets a general policy proscribing political activity. Through the technique of adoption by reference, Congress incorporated *all* then existing Civil Service Commission rulings and decisions adopted prior to 1940. In consequence, the law incorporates a lengthy series of administrative definitions of 'permitted' and 'prohibited' political activities that are not readily available." 1 CPA REPORT, 19 (Emphasis added.)

it would have delegated rule-making authority to the Commission,[18] or on Senator Hatch's floor substitute, the presently enacted and incorporation-by-reference version. The only report on the latter does no more than repeat its language verbatim, without comment. H. R. Rep. No. 2376, 76th Cong. 3d Sess. 11 (1940). Congressional debate on Section 15 supports the conclusion that prior rulings by the Commission in the thousands of individual cases it adjudicated before 1940 were incorporated, not merely some summary of them.

During the Senate debate on Section 15, opponents of the bill questioned what "determinations" it incorporated. Responding to these objections, Senator Barkley, the majority leader and an active supporter of the bill, suggested alternative language referring to Civil Service Rule I rather than to prior determinations. 86 Cong. Rec. 2950. A colloquy ensued, as follows:

> "Mr. Barkley. Mr. President, the Senator has objected to section 15 in substance—
>
> "Mr. Brown. Strenuously.
>
> "Mr. Barkley. On the ground that we undertake to write into law all the hundreds and thousands of interpretations of the Civil Service Commission on all the cases they have had before them. In order to meet his objection, as I thought, I was suggesting that we do not write into the law their interpretations but write into the law their rule, which is almost identical with the rule which we set up in the law itself [*i.e.*, Section 9(a)] . . . ." *Ibid.*

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[18] S. Rep. No. 1236, 76th Cong. 3d Sess. (1940).

Senator Barkley's suggestion never was formalized into a motion. Instead, Section 15 was passed in the form which he, a staunch supporter, understood to incorporate "all the hundreds and thousands of interpretations of the Civil Service Commission on all the cases they have had before them." *Ibid.*

This same understanding was forcefully expressed without contradiction, by Section 15's opponents. Senator Brown of Michigan declared:

> "We are asked to fix into hard and fast statute law every interpretation which has heretofore been made. Not a single one of those interpretations may be hereafter changed, no matter how wrong, no matter how far out of line those interpretations may be. We are making not only the rules, but we are making the interpretations, statute law . . . . In other words, there could be no building up of a body of judicial interpretations which might hereafter change. It would be hard and fast." 86 CONG. REC. 2949.

Senator Schwellenbach of Washington commented that "we will have to go through the minutes of the Civil Service Commission for the last 50 years and find every minute of the Commission which they have ever written into their book." *Id.* at 2949-50.

There was no pertinent debate on Section 15 in the House of Representatives. See *id.* at 9463-64.

After study of this legislative history, an academic commentator on Section 15 concluded that "there was an accumulation of convincing evidence of a congressional purpose to adopt thereby the individual pre-Hatch Act Commission determinations, rather than the pamphlet summary [*i.e.*, Form 1236 (1939 ed.)]." Rose, *op. cit. supra* at 24-25, 514.

(c) The Government's Positions in This Case

At one point in its brief, the Government asserts that "the intent [of Section 15] was to incorporate only those rulings that continued to represent viable interpretations of the restrictions as of 1940 . . . ." (Brief, 35). However, the Government suggests no way for a federal employee to distinguish "viable" determinations from those moribund on July 19, 1940. Subsequently, and inconsistently, the Government urges—without reference to any support for its view—that "it was not the decisions themselves that were the primary source of the incorporated definition of prohibited political activities, but rather the then-current interpretation of the concept by the Commission." (Brief, 36).

Various positions taken by the Government here as to what Section 15 incorporated cannot be squared with each other. Moreover, those positions are inconsistent with the record developed in the court below. In response to the district court's order to file copies of those determinations "*which are incorporated* into the Hatch Act by reference under the provisions of Section 15 thereof,"[19] the Government filed thousands of determinations. On that record, any reasonable and prudent employee, whose job depends on compliance with Section 9(a)'s prohibitions, would avoid any political activity that had been condemned by *any* filed ruling, if he were able to find, read and understand them all. The Government apparently concedes that the Constitution would not tolerate any such restriction on First Amendment rights, saying that, "if all that an employee of ordinary intelligence could look

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[19] App. 53 (Emphasis added.)

to in order to ascertain what conduct Congress prohibited in the Act were a compilation of pre-1940 administrative rulings, the statute might be vague and imprecise . . . ." (Brief, 41).

Even if some, but not all, of the thousands of individual, pre-1940 determinations are incorporated into Section 9(a) by Section 15, employees would still encounter grave difficulties in understanding the scope of Section 9(a)'s political activity prohibition. Any uncertainty as to what Section 15 incorporates leads to equivalent uncertainty as to what forms of political expression and association Section 9(a) prohibits. It must be remembered that Section 15 is the definition that *Congress* gave to Section 9(a). It cannot be overlooked.

2. Section 15 Renders It Impossible to Determine What Political Activity Remains Permissible.

There are at least two possible views of the impact, upon Section 9(a)'s prohibition, of whatever it was that Section 15 incorporated by reference. The statutory scheme reasonably could be construed to require a federal employee—and the Commission—to judge the legality of particular conduct by determining whether or not an analogue exists in the incorporated material. Alternatively, the referent incorporated by Section 15 could be viewed merely as an upper limit on the Commission's enforcement authority under Section 9(a). Regardless of which alternative is chosen, Section 15's definition does not clarify Section 9(a)'s prohibition.

All three judges below (court: J.S. 7a; dissenting judge; J.S. 30a) agreed that the incorporation technique operated only to provide an upper limit. The Government here adopts this position. (Brief, 41).

Yet, neither alternative is manifestly correct. Accordingly, the unusual statutory scheme leaves a prudent, conscientious employee no choice but to remain silent unless he can be certain that his speech is not covered by any one of the thousands of incorporated determinations.

Even if Section 15 only provides an upper limit, there is no ready way for employees, or the Commission, or a court reviewing Commission action, to determine where that limit is.

Unable to find adequate clarification in Section 15, the Government places its entire reliance upon the Commission's "authoritative construction" of the political activity prohibition (Brief, 11-12, 41-53), in effect reading Section 15 out of the statute as a meaningful definition of Section 9(a).

C. THE COMMISSION'S "CONSTRUCTION" OF THE POLITICAL ACTIVITY PROHIBITION

In the district court, the Government asserted that "this suit does not involve the validity or construction of the regulations published at 5 C.F.R. 733.122 or the administration of the Hatch Act." (App. 77, ¶4). This position was accepted by the district court (App. 79, ¶3) and is not challenged here. It leads logically to the Government's formulation of the sole question presented to this Court:

> "Whether the prohibition of the Hatch Act against federal employees taking 'an active part in political management or in political campaigns' is unconstitutional *on its face.*" (Brief, 2) (Emphasis added.)

Abandoning the position it took before the district court and failing to address the question presented,

the Government proceeds to bottom its defense of Section 9(a) on the proposition that the Commission's 1970 regulation rescues the 1939 statute's prohibition from any inherent vagueness and overbreadth.

Before holding Section 9(a) unconstitutionally vague, however, the district court gave thorough consideration to the Civil Service Commission's efforts to make it comprehensible. (J.S. 8a-9a). Far from "ignoring the role played by the regulations," as the Government charges (Brief, 47), the court found that the Commission "has acted responsibly in attempting the impossible task of applying the uncertain and conflicting provisions of the Act." (J.S. 9a). Finding the best efforts of the Commission of no avail, the court found that:

> "Uncertainties abound and they will produce excessive caution and stifle words and acts not explicitly prohibited. Small wonder that even those concerned with enforcement share the sense of uncertainty and confusion, as the record before us attests. [Footnote omitted.] Thus do generalized, vague prohibitions become misunderstood and misapplied and serve to limit expression by millions of Federal Government employees, and even their families, in a society where political speech and uninhibited, robust, wide-open debate on public issues are at the essence of self-government." (J.S. 10a).

For three independent reasons, the Commission's interpretations of the Hatch Act's political activity prohibition do not and cannot cure that prohibition's vagueness.

1. No Administrative Construction of a Statute Restricting Exercise of First Amendment Rights Can Cure Inherent Vagueness in That Statute.

The Government has not cited a single case supporting its argument that an administrative construction by regulation, or otherwise, can furnish needed clarity to an otherwise vague federal statute restricting First Amendment rights.[20]

An attack upon such a statute requires the Court to determine whether *Congress* has sufficiently delineated the conduct it intended to prohibit. Serious congressional imprecision in the First Amendment area

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[20] On pages 42 and 43 of its brief, where the Government addresses the impact of administrative construction on the vagueness issue, twelve cases are cited. Three hold state statutes unconstitutionally void-for-vagueness on their faces, even though one statute had "intricate administrative machinery for its enforcement." *Keyishian, Gooding, Cox* v. *Louisiana.* Two hold state action unconstitutional without passing on the facial validity of any statute. *Shuttlesworth, Edwards.* In one of these, *Shuttlesworth* v. *City of Birmingham,* the state unsuccessfully sought to defend challenged criminal convictions by relying on a state court's narrowing construction. Another of the Government's cases upheld a state oath requirement, accepting an interpretation given it by the agency which, unlike the Civil Service Commission here, had been explicitly entrusted with power to make a definitive interpretation. *Law Students Research Council.* In one case cited by the Government this Court upheld a federal statute on the basis of its own narrowing construction. *Harriss.* In that case, the Court rejected a broader construction urged by the Government. One Government case does not bear, in any way, on the question of relying on a narrowing administrative or judicial construction to save the constitutionality of a statute. It merely upholds the power of Congress to assimilate subsequently adopted state statutes in a criminal statute. *Sharpnack.* None of the remaining four cases cited by the Government involve any constitutional issue, much less a challenge to a statute restricting freedom of speech and association. *Udall* v. *Tallman, Perkins* v. *Matthews, Griggs* v. *Duke Power Co., United States* v. *City of Chicago.*

cannot be remedied by a regulation promulgated by an administrative agency. Prior decisions of this Court make plain that the statute itself must be sufficiently clear so that the Court can determine that the Congress made the "legislative judgment," *Cantwell* v. *Connecticut*, 310 U.S. 296, 307 (1940), that overriding governmental interests require regulation of speech and association.

> "[E]xplicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of Government, are not endowed with authority to decide them." *Greene* v. *McElroy*, 360 U.S. 474, 507 (1959).

When presented with a constitutional challenge to a federal statute, this Court itself has, on occasion, given the statute a narrowing construction in order to save it. *E.g., Oestereich* v. *Selective Service Bd., supra; United States* v. *Harriss*, 347 U.S. 612 (1954). On the other hand, "it must be remembered that '[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . .' or judicially rewriting it. *Scales* v. *United States*, [367 U.S. 203, 211 (1961)]," *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964); see *United States* v. *Robel*, 389 U.S. 258, 267 (1967): "The task of writing legislation which will stay within [constitutional] bounds has been committed to Congress."

Here, the Government goes far beyond asking the Court to construe narrowly, or even to rewrite, the Hatch Act's one sentence prohibition against active political management and campaigning. It asks the Court (Brief, 58-59) to give "authoritative" effect to an administrative regulation issued more than 30 years after the statute was enacted and in face of deliberate congressional withholding of rulemaking authority. At the best, the Commission's regulation amounts to nothing more than benign prosecutorial assurance and confirms Section 9(a)'s inherent vagueness and imprecision.

As this Court said just last Term:

> "Where First Amendment interests are affected, a precise statute 'evincing a *legislative* judgment that certain specific conduct be . . . proscribed,' *Edwards* v. *South Carolina,* 372 U.S. 229, 236 (1963), assures us that the *legislature* has focused on the First Amendment interests and determined that other governmental policies compel regulation. See Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 32; *Garner* v. *Louisiana,* 368 U.S. 157, 200, 202 (1961) (Harlan, J., concurring in judgment)." *Grayned* v. *City of Rockford, supra,* 408 U.S. at 109, n. 5. (Emphasis added.)

Mr. Justice Brennan has cogently explained why the language used by the Congress in any statute restricting First Amendment rights must satisfy the test of constitutional clarity, without regard to any subsequent administrative construction:

> "Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often

not answerable or responsive in the same degree to the people . . . .

"Congress has the resources and the power to inform itself, and is the appropriate forum where the conflicting pros and cons should have been presented and considered."

United States v. *Robel, supra,* 389 U.S. 258, 269, 276 (Brennan, J., concurring).

The argument that Congress delegated legislative responsibility over free speech and association to the Civil Service Commission is untenable as a matter of sound constitutional principle.

2. Since the Congress Deliberately Withheld Rulemaking Authority, the Commission Cannot Lessen the Statute's Vagueness.

Expressly recognizing constitutional obstacles to delegating authority to regulate First Amendment rights, Congress unequivocally refused to grant authority to the Civil Service Commission to define the forms of political activity in which government employees may engage. The legislative history of Section 15 plainly refutes the Government's argument "that Congress expected reliance on the Commission's interpretation" (Brief, 44) of Section 9(a)'s prohibition.

Early in 1940, Senator Hatch introduced S. 3046, 76th Cong., to amend the Hatch Act of 1939. 86 CONG. REC. 62. Without hearings, the Senate Committee on Privileges and Elections amended the bill and reported it out favorably on February 26, 1940. S.REP. No. 1236, 76th Cong. 3d Sess. (1940). As reported, S. 3046 proposed a new section authorizing:

"the Civil Service Commission to define the term 'active part in political management or in political campaigns' as that term is used in the prohibitions applicable to Federal employees and in the

prohibitions applicable to State and local officers and employees." *Id.* at 2.

There were two weeks of debate on various amendments to the Hatch Act, much of it directed to the argument that its extension to state and local employees would violate "states' rights."[21] During this debate, there was substantial criticism of the above-quoted Committee version of Section 15 as representing too broad and uncontrolled a delegation of power, with particular reference to First Amendment rights.[22]

Responding to this strong opposition, Senator Hatch offered a substitute Section 15,[23] which is now the law. This substitute was adopted by the Senate on March 15, 1940, the same day it was offered.[24] S. 3046 passed the Senate three days later, on March 18.[25]

Without hearings, the House Judiciary Committee reported S. 3046, with some amendments, but did not change the Senate's incorporation-by-reference version of Section 15.[26] Neither the Committee report nor the floor debate[27] commented on Section 15. The House passed the bill on July 10 with Section 15 unchanged,[28] and the Senate accepted the House amendments the following day.[29]

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[21] 86 CONG. REC. 2338-2987.

[22] *E.g.*, 86 CONG. REC. 2427, 2928-30, (Senator Lucas); *id.* at 2579 (Senators McKellar and Brown); *id.* at 2720-21 (Senators Bankhead and Connally); *id.* at 2865-66 (Senator Minton); *id.* at 2875, 2924-27 (Senator Thomas of Okla.)

[23] *Id.* at 2928, as modified at 2937.

[24] *Id.* at 2958.

[25] *Id.* at 2987.

[26] H. R. REP. No. 2376, 76th Cong. 3d Sess. (1940).

[27] 86 CONG. REC. at 9360-80, 9426-32, 9434-42, 9445-64.

[28] *Id.* at 9463-64.

[29] *Id.* at 9497.

When Senator Hatch offered the present language of Section 15 as a substitute for the Committee's rule-making version, he said, "it does away with the question of delegation of power . . . ." [30] He explained his substitute Section 15 as follows:

> "I am endeavoring to have all employees put under exactly the same rule, and it seemed to me to be very wise not to give the Commission any more power to interpret further in the future." [31]

Senator Hatch later compared the original and discarded version of Section 15 with the substitute that was enacted, saying:

> "Section 15 [the Committee version] gives the Commission power to define the term 'political management and political campaigns' and the power to issue rules and regulations. If that section is stricken out, the Commission will not have that power." [32]

That section *was* stricken out.

If the Congress had enacted the Committee version of Section 15, this case would be governed by the proposition considered in the preceding section: that a legislature cannot delegate to an administrative agency authority to decide what First Amendment rights require regulation and authority to determine the form, extent, and triggering circumstances of such regulation. Here Congress recognized that the Constitution barred such a delegation and deliberately withheld from the Commission power either to expand or to contract the legislative prohibitions.

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[30] *Id.* at 2928.

[31] *Id.* at 2949.

[32] *Id.* at 2951; see also, 2947-50.

3. The Commission's Various Interpretations of Section 9(a) Are Void-for-Vagueness.

(a) The Commission's 1970 Regulation

Since the Government relies chiefly upon the Commissions's 1970 regulation as "a definitive statement of [employees'] obligations and responsibility under the Act" (Brief, 44), that regulation must be analyzed for its clarity, or lack thereof. Its key section, 5 C.F.R. § 733.122(b), lists 13 categories of prohibited activities. Introducing this list is the familiar catch-all clause: "include but are not limited to—" (*Ibid.*)

The "include but are not limited to" caveat confers completely open-ended discretion upon the Commission. It leaves the Commission free to enforce the statute's prohibition in an arbitrary or discriminatory manner. *Cf. Baggett* v. *Bullitt,* 377 U.S. 360 (1964). This escape hatch for the Commission's exercise of discretion underscores the double-edged threat to federal employees of Section 9(a)'s vagueness: if he misreads its reach and speaks in a manner that the Commission deems to be covered, he may lose his job; otherwise he engages in self-censorship.

Apart from this open-ended caveat, the regulation's list of 13 categories of "permissible activities," 5 C.F.R. § 733.111, itself affords no protection to employees' rights and does not clarify or limit the statute. This is so because the so-called "permissible" activities are, in fact, permitted only to the "extent consistent with the restrictions imposed by law and this subpart." 5 C.F.R. § 733.111(a). This condition, by returning the employee to the face of Section 9(a), effectively eliminates the list as a reliable guide to action.

Consider, for example, the "permissible activities" category which purportedly permits "a financial contribution to a political party or organization." 5 C.F.R. § 733.111(a)(8). Financial contributions to *candidates* are not mentioned. Since the regulation also provides that "an employee may not take active part in political management or in political campaigns, *except as permitted by this subpart,*" 5 C.F.R. § 733.122(a) (Emphasis added.), the regulation leaves the Commission free to discipline a federal employee for making a contribution directly to a candidate, provided only that it deems the contribution to constitute active political participation, which returns us, full circle, to the vagueness of the statutory language, considered on its face.

When does a financial contribution constitute active political participation? Would direct or indirect financing of a major portion of a political campaign be covered? Given proper circumstances and publicity, would even a modest contribution be covered?[33]

Significant additional areas of vagueness and confusion in the Commission's regulation emerge from comparison of the "permissible activities" with the "prohibited activities." The most constitutionally significant "permissible" activity is the employee's purportedly retained right to "express his opinion as an individual privately and publicly on political subjects

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[33] Assuming that there exist circumstances in which a contribution of money for partisan, political purposes would not be deemed "an active part in political management or in political campaigns," what compelling governmental interest is served by prohibiting contributions of services to a political candidate while permitting contributions of money? This contrast raises questions as to whether the Hatch Act discriminates between employees on the basis of wealth.

or candidates." 5 C.F.R. § 733.111(a)(2). Yet, many forms of political expression of opinion also fall within the regulation's prohibition against "soliciting votes in support of or in opposition to a partisan candidate for public office or political party office." 5 C.F.R. § 733.122(b)(7).

The Commission's regulation fails to inform covered employees of when the Commission will deem expression of opinion on political subjects or candidates to be the "soliciting of votes." Is an employee safe from possible punishment if he expresses his opinion that a particular candidate is undoubtedly the best, or worst, candidate so long as he avoids the final, explicit exhortation to vote for, or against, that candidate?

The uncertainties that arise from the obvious overlap of permitted "expression" and prohibited "solicitation" directly affect the exercise of basic First Amendment rights. The Government's brief exhibits insensitivity to high constitutional values when it persistently dismisses this, and the other ambiguities inherent in the statute and in the Commission's regulation, as involving only "interstitial situations" (*Id.* at 50), or "a relatively few uncommon or borderline situations." (*Id.* at 52). These conflicting permissions and prohibitions paralyze the worker's exercise of the most cherished freedoms safeguarded by the Bill of Rights.

(b) Letters to Newspapers

Examination of the Commission's efforts to provide an authoritative construction of the Act—in one constitutionally significant context—confirms that Section 9(a) fails to give federal employees adequate notice

of what is prohibited and what is permitted and leaves the Commission free to exercise arbitrary prosecutorial discretion. This examination also will serve adequately to demonstrate that the Commission has, in fact, failed to supply clarity to the statute.

The question that we shall seek to answer from the statute, "as authoritatively construed," is:

> *Whether a federal employee may submit a single letter, article, or advertisement to a newspaper of general circulation supporting or opposing a particular partisan candidate, provided he acts independently of any political organization?*

Close reading of the 1970 regulation will not reveal whether a letter is an act of permitted "expression" or an act of prohibited "solicitation." That regulation does prohibit employees from "endorsing or opposing a partisan candidate . . . in a political advertisement, a broadcast, campaign literature, or similar material." 5 C.F.R. § 733.122(b)(10). The Government, in a litigation stance here, classifies a letter as "permitted expression" without citation of authority. (Brief, 40, n.13). Yet, until 1955, when Judge Youngdahl overruled the Commission in *Wilson* v. *United States Civil Service Commission,* 136 F.Supp. 104 (D.D.C. 1955), it had uniformly held that any such letter, article, or advertisement was prohibited. E.g., *Matthews,* 1 P.A.R. 212 (1945); *Rydzynski,* 1 P.A.R. 592 (1951); *Shaw,* 1 P.A.R. 672 (1953).

Shortly after the *Wilson* decision, the Commission ruled that the insertion of a single paid political advertisement was prohibited, even though it appeared in the "To the Editor" column. *Evans,* 1 P.A.R. 679 (1953); see *Gooch,* 1 P.A.R. 830 (1961). This ruling

is effectively preserved in the subsection of the 1970 regulation quoted above.

How narrowly the Commission read *Wilson* comes clear from its decision in *Massingham,* 1 P.A.R. 792 (1959). There, a nursing assistant at a Veterans Administration hospital placed the following advertisement in the Poplar Bluff, Missouri, newspaper of general circulation:

> "TO ALL MY MANY FRIENDS OF POPLAR BLUFF AND BUTLER COUNTY
>
> I want to take this opportunity to ask your vote and support in the election, TUESDAY, AUGUST 7th. A very special person is seeking the Democratic nomination for Sheriff. I do not have to tell you of his qualifications, his past records stand.
>
> This person is my dad, Lester (Less) Massingham.
>
> THANK YOU
>
> WALLACE (WALLY) MASSINGHAM"

(*Id.* at 793).

The Commission found that this advertisement was respondent's "personal action, sponsored by no one else, not known in advance by the candidate" (*Ibid.*), and that "he unquestionably was actuated by admiring affection for his father." (*Id.* at 797). Nevertheless, the Commission found the advertisement to be "clearly within the prohibition of the statute and rule against taking an active part in a political campaign." (*Id.* at 793). Not only did the Commission refuse to follow *Wilson* because it felt compelled to do so by Section 15 (*Id.* at 793-94) and because Massingham paid for his advertisement (*Id.* at 796), it criticized *Wilson* for fail-

ing to take account of pre-1940 determinations which Section 15 incorporated by reference. (*Id.* at 796).

The Commission also responded to *Wilson* by adding two words "soliciting votes" to the warning in its Pamphlet 20 that a government employee "may not write for publication or publish any letter or article, signed or unsigned, in favor of or against any political party, candidate, or faction." *E.g.*, P.A.R. Cum.Supp. 32, 60; see Govt. Brief, 75 n.6. The words "soliciting votes" do not appear in the subsection of the Commission's 1970 regulation dealing with advertisements, etc. 5 C.F.R. § 733.122(b)(10).

In the context of Pamphlet 20, the two added words "soliciting votes" afford no help to any employee of ordinary intelligence who wishes to express his opinion in a letter to a newspaper but at the same time desires to conform to the Commission's view of the statute. The palpable purpose of any serious letter to a newspaper "in favor of" a candidate is to solicit votes for him. Moreover, the Commission's decision in *Massingham* entirely ignores the factor identified as critical by the district court in *Wilson*, namely, the absence of evidence that the respondent had acted in concert with others as part of an organized campaign. See 136 F. Supp. at 106. The fact that Massingham paid to have his expression published, and Wilson did not, has no constitutional significance, since both cases concerned individual, unconcerted expression of opinion on matters of public importance.

In summary, the Commission's various efforts to provide an "authoritative construction" for Section 9(a)'s political activity prohibition that will answer the question about submitting political opinion for

publication in a newspaper has led to the following results:

(a) No certain answer can be gleaned from the Commission's 1970 regulation.

(b) From 1940 to 1955, the Commission made its position relatively clear in its pamphlets and rulings: an employee would be punished if he submitted any item of partisan, political advocacy for newspaper publication, regardless of whether it was an unpaid letter to editor or a paid advertisement.

(c) In 1955, in *Wilson,* Judge Youngdahl overruled the Commission and held that writing a letter to the editor could not be prohibited under Section 9(a) unless the author acted in concert with others.

(d) In several cases thereafter and its 1970 regulation the Commission distinguished *Wilson* and ruled that an employee could be punished for submitting even one paid advertisement even if he acted alone.

(e) In response to *Wilson,* the Commission made a meaningless change in its pamphlet and continued to advise employees that sending a single letter to a newspaper "soliciting votes" was forbidden despite *Wilson's* "in concert" rationale.

(f) Now, in 1972 and 1973 as part of this litigation, the Government has declared, without qualification or citation, that "employees are free to write letters on political subjects to newspapers" (Motion to Dismiss (Dist. Ct.), p.4, n.2; see App. 88) and that "a letter to the editor of a newspaper would be permitted expression of opinion." (Brief, 40, n.13).

When the status of the right to publish political opinion without fear of being fired is as fraught with

confusion and contradiction as this summary demonstrates, the underlying regulatory scheme is patently void for vagueness. Moreover, the Commission's refusal to follow the *Wilson* decision, because of contrary incorporated determinations, confirms that the statute's vagueness leaves the Commission free to act in a capricious fashion.

D. EMPLOYEES DO NOT AND CANNOT UNDERSTAND THE POLITICAL ACTIVITY PROHIBITION.

There is abundant proof that most federal employees are bewildered both by the political activity prohibition of Section 9(a) and by the Commission's "authoritative construction." Persuasive and unrebutted evidence of widespread confusion both by those subject to—and those entrusted with enforcing—Section 9(a), confirms that this statute misleads and fails to warn persons of ordinary intelligence of what it forbids.

In 1967, the Commission on Political Activity of Government Personnel [34] commissioned the Survey Research Center, University of Michigan, to conduct a scientific sampling of federal employees to determine their knowledge and opinions regarding political activity.[35] The statistical validity of this survey has been conceded by the Government. (App. 79, ¶ 4).

Particularly pertinent is the test of employees' knowledge of the "do's" and "don't's" of the political activity prohibition. Employees were shown a list of

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[34] See p. 27, n.17, *supra*.

[35] 1 CPA REPORT, 12-13 (1967). The results and methodology of this survey are set out in full in volume 2 of the Commission's Report, 1-64.

ten common types of political activity (*e.g.*, "make a speech at a rally held by a political party;" "put a political sticker on his own car") and asked whether or not they were permitted to engage in each. Not one employee scored higher than eight correct responses; 64.1 percent of all federal employees understood less than half of the selected restrictions. 1 CPA REPORT, 20.

After studying this survey, and after extensive public hearings in six cities across the nation, the Commission found:

> "Faced with compelling evidence that the existing law unduly confuses and restricts more than 4.5 million Federal, State, and local public employees, this Commission proposes a new approach. It recommends that Congress eliminate the confusing array of do's and don't's by clearly defining permitted activities and prohibitions in the statute. The prohibitions would be only those that Congress finds necessary to protect employees against actions that would threaten the integrity, efficiency, and impartiality of the public service." *Id.* at 21.

As appellant in this case, the Commission finds Section 9(a) clear and precise. Six years ago, however, discussing its problems in administering the statute, the Commission recognized the vagueness inherent in the Hatch Act's political activity prohibition, stating:

> "We believe it desirable that the general language of the present Act, 'tak[ing] an active part in political management or in political campaigns,' be made more definitive. The term is qualified to include only those political activities prohibited to employees in the competitive civil service prior to July 19, 1940. However, we are asking in another recommendation that this qualification be repealed. Conditions have changed since 1940. The prohi-

bitions imposed prior to that time may not all be valid in light of present circumstances.

In essence, notwithstanding the present qualifying provision, the present language is somewhat broad and somewhat uncertain. It is broad in the sense that it could be construed to prohibit certain activities that may not be sufficiently detrimental to the neutrality, efficiency, or integrity of the civil service as to justify the infringement of individual political rights. *It is uncertain in that it fails to define with clarity and precision the types of activities which are prohibited.*" 3 CPA REPORT, 15 (Emphasis added.)

As the district court found, "indeed, even those most intimately concerned with its enforcement are in doubt and have sought legislative clarification." (J.S. 7a).

In addition, Roger W. Jones, a former chairman of the Commission, who has more than 35 years of experience as a personnel administrator, at the highest levels of the Federal Government (App. 117), and whose expertise is conceded by the Government (App. 150), testified in this case as follows:

"As a former Chairman of the United States Civil Service Commission, I have continued to observe the employee confusion engendered by the vague and indefinite language of the statute as cross referenced to the mass of the pre-1940 decisions. The list of prohibitions growing out of the Civil Service rules is outdated, imprecisely drawn, and consequently so inconsistent as to preclude equitable administration. It follows, I believe, that bona fide Civil Service Commission attempts to explain and apply the statute are bound to result in conflicting decisions because the underlying statute is vague and indefinite. Thus, apart from the fact that the Act prohibits many harmless activities the Act also, because of the incorporation of

the pre-1940 rulings, presents an inherently insuperable problem of construction for those charged with administering it: the Civil Service Commissioners. Although the Commission has published various explanatory pamphlets attempting to clarify the scope of the prohibitions, I think that these attempts, by and large, have not dispelled employee confusion." (App. 120-21).[34]

Under questioning by Judge Gesell, he amplified this statement as follows:

"JUDGE GESELL: Mr. Jones, I had a question on your affidavit that I did want to take this opportunity to ask you to elaborate on a bit. You say on Page six that you have continued to observe the employee confusion engendered by the vague and indefinite language of the statute as cross referenced to the mass of the pre-1940 decisions. Could you give us a little better idea of what you are talking about there?

"THE WITNESS: Yes, I can, sir. In various of my jobs, including the most recent period of service in the Office of Management and Budget and Bureau of the Budget, because of my former experience, I have had even our rather sophisticated and highly graded and highly paid staff come to me on countless occasions to ask whether I thought this, that or the other activity was prohibited by the Hatch Act.

"Above and beyond that I have seen on any number of occasions employees attempt to read Pamphlet 20, or to look at the poster which the Civil Service Commission has the agency post on their bulletin board, with a list of 'do's and don't's

[34] While this testimony was in form of an affidavit, the Government stipulated to its admissibility into evidence, subject only to objection on the ground of relevancy. (App. 148). Mr. Jones also presented live testimony. (App. 150-61).

or permitted and not permitted, and stand there and shake their heads in concern, and I think in some degree of disbelief. Despite all of the efforts of the Commission to explain, there is great confusion today, and I think this is particularly true among the rank and file, with respect to the issue of expressing your views on political opinion.

"The action before you today has been brought on behalf of one of the organizations of our Postal Workers. I have had postal carriers say to me, 'What do I do when a housewife asks me if I have some opinion about this, that or the other kind of Government program?' This kind of confusion is not good.

"There has been a long argument on whether members of carpools may stop at the polls and vote on their way in in the morning, or whether this contravenes the restrictions against carrying people to the polls. The question of serving as an officer at an election—is this to be mixed up as serving as a partisan watcher or checker. I could go on, sir. Is this sufficient?

"JUDGE GESELL: Some of the papers suggest that because of the uncertainties such as you have been talking about, that there may be a tendency on the part of supervisors and others in the Government who are advising Federal employees, to speak in terms of the policy of the Act, and suggest abstention perhaps even beyond that, which the statute itself contemplates. In your experience is that likely, or has that happened?

"THE WITNESS: That is likely, and it has happened. Again, there are many circumstances that I could cite. I have heard important officials of rather large Federal installations make speeches to their staff at the time of political campaigns that were far removed from the actual prohibitions of the Act, and have attempted to tell them, 'I may not be accurate in all of this'—I am

putting this in quotes—'I may not be quite accurate in all of this, but I want you to know it is our policy for you people to stay clear of political involvement.'

"JUDGE GESELL: Do you have any questions?

"MR. ANDERSON [Government counsel]: I have no questions, your Honor." [35]

Although not dispositive, the bewilderment of employees—and enforcement authorities—strongly supports the district court's holding that Section 9(a)'s political activity prohibition is void for vagueness. The record shows that the vagueness of Section 9(a) makes it a sword of Damocles constantly hanging, uncertainly, over the heads of millions of federal employees, inhibiting them in the exercise of rights protected by the First Amendment. The manifest and widespread confusion over the scope of the statute goes not merely to peripheral or borderline issues, it extends to the entire range of meaningful political expression and association protected by the First Amendment.

III THE HATCH ACT'S SWEEPING RESTRICTION ON EXPRESSION AND ASSOCIATION IS OVERBROAD AND IS NOT COMPELLED BY ANY PARAMOUNT GOVERNMENTAL INTEREST.

All conduct subject to Section 9(a)'s political activity prohibition is ordinarily entitled to constitutional protection. Hence, the overbreadth question here is whether the conceded governmental interest in preserving a neutral and efficient merit system for public employees adequately justifies the Hatch Act's blunderbuss encroachment on First Amendment protected rights. The overbreadth doctrine requires the Court to

[35] App. 155-56; there is further evidence of actual employee confusion at App. 122-45.

determine whether the entire prohibitory scheme of Section 9(a) can constitutionally be sustained, not merely whether one or two prohibitions at the outer edges might be excised as superfluous or excessive.

A. CONGRESS FAILED TO FIND, EXPLICITLY OR IMPLICITLY, THAT A SWEEPING RESTRICTION ON SPEECH AND ASSOCIATION WAS REQUIRED TO SAFEGUARD THE MERIT SYSTEM.

The Hatch Act resulted from congressional concern with abuses of coercion, intimidation and misuse of official authority in various federal elections in 1936 and 1938. Congress was properly concerned that the federal merit system might be destroyed unless widespread abuses, entailing misuse of government funds and positions through political coercion and intimidation, were promptly stopped.

The first eight sections of the Act,[36] and the first sentence of Section 9(a), carefully focus on these obvious threats to the integrity, neutrality, and indeed, continued viability of the merit system instituted by the Pendleton Civil Service Act of 1883.[37] These provisions of the Hatch Act are not challenged.

The second sentence of Section 9(a) takes a radically different approach: rather than outlawing the identified evils, it broadly bars millions of federal employees from engaging in otherwise proper and constitutionally protected activities.

The legislative history of the Hatch Act unequivocally refutes any suggestion that the Congress, in its deliberations, found that such restrictions were needed

[36] 53 Stat. 1147, now condified at 5 U.S.C. §§ 7324, 7325, 18 U.S.C. §§ 594, 595, 600, 601, 603, 605. The entire 1939 Act is set out at P.A.R. Cum. Supp. 5-7.

[37] Act of January 16, 1883, 22 Stat. 403.

to eliminate the abuses that had been found and recognized. The summary of the pertinent legislative history of Section 9(a), as enacted in 1939, is set out in the Appendix to this brief. *Infra,* pp. 18a-27a.

As shown by the Appendix, none of the problems that concerned the 1939 Congress arose from the voluntary exercise of speech or association by government employees. Rather, they all stemmed from coercion, intimidation, and misuse of official authority and funds. The supporters of Section 9(a)'s sweeping restrictive provision did not point out a single abuse that could not be eliminated by the direct prohibitions on misuse of office contained in Sections 1 to 8 and the first sentence of Section 9(a). The legislative record is barren of any explanation why straightforward prohibitions against official coercion and intimidation would not be wholly effective to achieve the congressional objectives.

The failure of Congress to make any evaluation of the need for a broadside impairment of First Amendment freedoms to cure particular, identified election abuses probably resulted from familiarity with the identical ban which was contained in existing Civil Service Rule I, but which was limited to classified employees. This approach had been in effect since 1907, when President Theodore Roosevelt promulgated Executive Order 642 under general presidential authority to prescribe rules for the competitive service.[38] Pursu-

[38] Act of March 3, 1871, ch. 114, § 9, 16 Stat. 514, and Civil Service Act of 1883, 22 Stat. 403, 404, pertinent portions now codified at 5 U.S.C. §§ 1301, 3302. Fourteen years previously, as a Civil Service Commissioner, Roosevelt recognized that the Commission "has no power whatever" to construe a rule "about what is deemed proper partisanship in the classified service." ELEVENTH ANNUAL REPORT OF THE CIVIL SERVICE COMM'N 20-21 (1894). There was no change in any pertinent statute between 1894 and 1907.

ant to Executive Order 642, the Commission, in 1907, issued Civil Service Rule I, which, among other things, prohibited employees in the competitive classified service from taking an "active part in political management or in political campaigns." [39] Thirty-two years later, when Congress passed the Hatch Act, it extended the applicability of Civil Service Rule I, including the political activity prohibition, to more employees. In doing so, Congress failed, however, to give the necessary, careful consideration to whether or not there was a compelling governmental interest to justify the Rule's restrictions on exercise of First Amendment rights.

Since Rule I was of executive, not legislative, origin, Congress itself has *never* independently examined the need for its sweeping prohibition. Indeed, from the time of the first Congress until 1907, when President Roosevelt acted by executive fiat, there were various legislative proposals to restrict political activity of government employees. Congress consistently rejected these proposals, frequently referring to the unconstitutional abridgment of free speech and association that they represented. A summary of eighteenth and nineteenth century congressional action is included in the Appendix to this brief. *Infra,* pp. 2a-18a.

For example, the very first Congress defeated, 37-21, a bill that would have prohibited inspectors of distilled spirits "from interfering, either directly or indirectly, in elections, further than giving their own votes, on penalty of forfeiting their offices." [40] Repre-

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[39] TWENTY-FOURTH ANNUAL REPORT OF THE CIVIL SERVICE COMM'N, 104 (1908).

[40] 2 ANNALS OF CONG. 1876-78 (1791).

sentative Fisher Ames objected to the bill on the ground that "it will muzzle the mouths of freemen, and take away with the use of their reason."[41] Half a century later, Senator John C. Calhoun objected to a bill restricting the political activity of federal officers on the ground that "a citizen does not cease to be one in becoming a Federal officer."[42] Senator James Buchanan declared that this same bill was worse than the sedition law and called it a "gag law" which would clearly violate the First Amendment.[43] It too was defeated.[44]

Throughout the nineteenth century, as the Appendix hereto details, the various efforts, legislative and executive, to control election abuses by federal employees were most often narrow, clear, and limited to specific abuses rather than sweeping restrictions on voluntary political activity. Thus, it is not surprising that the Civil Service Act of 1883 contained no restrictions on voluntary activity or that no such restriction was suggested during consideration of that law.[45]

The Government argues that, in 1907, after 24 years of experience under the Pendleton Act, "*the Civil Service Commission concluded* that the prohibitions in the Act and Rule against using official authority or influence to coerce the political action of others or interfere with elections did not suffice to control improper political activity by those in office." (Brief, 69) (Emphasis

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[41] *Id.* at 1877.

[42] CONG. GLOBE, 25th Cong. 2d Sess. App. 234 (1838).

[43] *Id.* at 203-10.

[44] *Id.* at 226; See CONG. GLOBE, 26th Cong., 1st Sess. 116, 406 (1840).

[45] See Appendix, *infra*, pp. 10a-13a.

added.) Be that as it may, *Congress* did not then, or later, make any such finding, implicitly or explicitly.

The executive, rather than legislative, origin of the language challenged here increases its vulnerability to constitutional attack. That the language of the political activity prohibition originated in an executive order of sixty-six years ago does not increase its dignity or serve as any shield against constitutional challenge.

The House debates in 1939 on enactment of Section 9(a) reveal why Congress did not then apprehend a need for carefully evaluating the effect of its sweeping restriction of First Amendment rights of government employees. Congress shared the then prevailing notion of constitutional law that, when a person entered government employment, he waived any First Amendment rights that the legislature, in its discretion, might previously have determined that government employees should not exercise. The right-privilege distinction was sharp and distinct for the 84th Congress.[46] Even the most vigorous opponents of Section 9(a) did not criticize restrictions on the First Amendment rights of public employees by reference to the compelling governmental interest test.[47] Even the most vigorous opponent of Section 9(a), Representative Hobbs of Alabama, primarily attacked it as being a retrospective application of a new condition to employees already in service, analogizing its operation to an ex post facto criminal law.[48]

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[46] But see Perry v. Sindermann *supra*, 408 U.S. 593; Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[47] See, generally, 84 Cong. Rec. 9594-9638.

[48] *E.g.*, 84 Cong. Rec. 9602, 9622, 9893-95 (Rep. Hobbs).

Acting in the light of these now discarded conceptions of public employees' rights, Congress proceeded to enact Section 9(a) and to prohibit federal employees from engaging in a wide and ill-defined range of activities. It did so without any express finding (or any basis for such a finding) that the prohibition was needed to protect incompatible and paramount government interests or that no less restrictive an alternative would suffice.

B. SECTION 15's DEFINITION AGGRAVATES THE OVERBREADTH OF SECTION 9(a)'s POLITICAL ACTIVITY PROHIBITION.

Whatever reading is given to Section 15, it defines Section 9(a)'s political activity prohibition to cover an extremely broad range of voluntary political activity. Under even its most restricted reading,[49] Section 15 incorporated material that prohibited, among other things, betting or wagering on elections, playing in a band during a political parade, being active in campaigns concerning the liquor question, circulating petitions to state, county, or municipal governments, or supporting the appointment of anyone to an unclassified federal office. (App. 99-100). Under the more generally accepted reading, which links Section 15 to all the thousands of pre-1940 rulings, countless activities are included in the incorporated definition. The

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[49] The most limited reading of Section 15 urged by the Government is that it incorporated "the then-current interpretation of the concept by the Commission" (Brief, 36), which is the one set forth in Form 1236 of September 1939, reprinted at App. 89-106. Although the Government urges that even this incorporation is limited by the three statutory exceptions (Brief, 39), it is clear that Congress recognized no distinctions between the activities embraced within the definitional referent.

district court's sampling is set out in the margin.[50] The Court can find many other incorporated prohibitions

[50] The district court's choice of examples of pre-1940 rulings prohibiting specific activities follows. The phrasing is that used by the district court (J. S. 5a):

(1) made a wager on an election; (Index # 63, Atkins, 31 A.R. 160)

(2) offensively discussed a "political question"; (Index # 24, Hiner, 32 A.R. 141)

(3) Disparaged the President; (Index # 24, Dunham, 32 A.R. 144)

(4) denounced a political party while in a jovial mood due to alcohol; (Index # 24, Bock, 31 A.R. 146)

(5) publicly engaged in a political discussion; (Index # 24, Mure, 34 A.R. 148)

(6) wrote a political letter; (Index # 64, Cain, 32 A.R. 143)

(7) publicly expressed a political opinion; (Index # 24, Chester, 32 A.R. 143)

(8) published a political article; (Index # 51, Nihart, 32 A.R. 143)

(9) wore a political button while on duty; (Index # 7, Ratcliffe, 34 A.R. 144)

(10) stated unsubstantiated facts about ancestry of a candidate; (Index # 54, Smith, 1922 Min. 343)

(11) made offensive political remarks; (Index # 24, Edmonds, 33 A.R. 151)

(12) failed to discourage a spouse's political activity; (Index # 17, Brock, 1935 Min. 209)

(13) stated disapproval of treatment of veterans while acting as a Legion officer in a closed Legion meeting; (Index # 25, Davis, 1935 Min. 154)

(14) was partisan in political views; (Index # 24, Castleberry, 32 A.R. 145)

(15) allowed one's name to be associated with an objectionable political affair; (Index # 35, Woody, 1933 Min. 670)

(16) authored an anonymous political communication; (Index # 9, MacDonald, 1933 Min. 293)

The citation system used here is that suggested in 1 P.A.R. i and ii, and with reference to the index, *id.* at iii-xxvi.

by leafing through the three big volumes of pre-1940 rulings that have been filed.[51]

Although the Government argues that the impact of Section 15 is limited by the Commission's contemporaneous interpretation and further by the First Amendment (Brief, 56-57), the fact remains that Section 15, on its face (which is what is at issue here), not only further confused the meaning of Section 9(a), it also extended it to particular activities whose restriction was not, in 1940, and cannot, in 1973, be justified by any paramount governmental interest.

Indeed, to accept the argument that Section 15 must be read as limited by the contours of the First Amendment would be to read the overbreadth doctrine out of the Constitution. Under the Government's approach (most directly set out in the Affidavit of the Commission's General Counsel, App. 56), every overbroad statute is self-correcting: the limits imposed by the Constitution are automatically applied, and no prohibition that exceeds those limits will be imposed. This Court requires more. Statutes may not *appear* to deny First Amendment rights. If they do, citizens will forbear from exercising their rights, which thus become "chilled". Government-induced self-censorship is no less censorship forbidden by the First Amendment.

C. NEITHER THE COURT NOR THE GOVERNMENT CAN FURNISH THE MISSING FINDINGS OF OVERRIDING INTERESTS NEEDED TO SUSTAIN THE ACT.

To defeat an overbreadth challenge, the Government must demonstrate that a less restrictive ban limited to direct prohibition of recognized, identified abuses will

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[51] Note that the three-volume *Political Activity Reporter*, which also has been filed with the Court, contains no pre-1940 Commission decisions, only a generalized "index" to them.

not suffice to remedy them. Compare *Sherbert* v. *Verner*, 374 U.S. 398 (1963) with *United States* v. *O'Brien*, 391 U.S. 367 (1968); see *Dunn* v. *Blumstein*, *supra*, 405 U.S. at 343; *Hobbs* v. *Thompson*, *supra*, 448 F.2d at 470-71:

> "Since public employees make up an ever-increasing portion of the work force, a blanket prohibition upon political activity, not precisely confined to remedy specific evils, would deal a serious blow to the effective functioning of our democracy. In this area, the overbreadth doctrine plays an important role, for it requires the *legislature* to focus narrowly on the particular evils it wishes to combat when speech is at stake." (Emphasis added.)

The needed legislative findings cannot be inferred from the mere fact that the Congress passed the Act. Any such approach would eliminate overbreadth review by the courts, for it represents wholesale deference to the legislative action and obviates judicial evaluation of the basis for restricting First Amendment rights in particular instances.

Faced with the clear failure of Congress to furnish the findings necessary to sustain the statute, the Government made no effort to fill the void. To the contrary, it vigorously resisted the Letter Carriers' efforts to discover evidence relevant to any compelling governmental interest or to the impact on the civil service of less restrictive measures. (See App. 38-51, 70-72, 77-78, 81, 146).

The Letter Carriers proffered evidence that the federal civil service merit system would not be jeopardized by permitting government employees freer exercise of their rights of speech and association. Roger W. Jones, a witness qualified as an expert [52] on federal civil serv-

[52] See *supra*, p. 49.

ice administration, testified that allowing federal employees to engage in many "activities prohibited by the Hatch Act . . . would have no effect, in my judgment, upon the continued effective functioning and impartiality of the Civil Service." (App. 120).

Other evidence which the Letter Carriers called to the court's attention included the findings and conclusion of the Commission on Political Activity of Government Personnel that the political activity prohibition, at least in its present sweeping form, was unnecessary to insure the continuing integrity and vitality of the merit system.[58]

The Letter Carriers also invited the court's attention to 1967 testimony of the Civil Service Commission that the prohibition of Section 9(a):

> "is broad in the sense that it could be construed to prohibit certain activities that may not be sufficiently detrimental to the neutrality, efficiency, or integrity of the civil service as to justify the infringement of individual political rights." 3 CPA REPORT, 15.

This represents the official statement of the federal agency charged with enforcing the Hatch Act—the very agency whose "authoritative construction" the Government relies upon to save the Act from overbreadth. Yet that agency found, in its official deliberations, that the Act is overbroad.

The Government offered no rebuttal to the Letter Carriers' prima facie case that Section 9(a)'s political activity prohibition is overbroad and more restrictive

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[58] 1 CPA REPORT, *passim*, but particularly the alternative detailed statutory scheme recommended at 44-60.

than necessary to protect all identifiable public interests. The only finding that a court could make, on the record in this case, is that there are feasible and less restrictive alternatives to remedy all the abuses within the target area of Section 9(a)'s second sentence. Hence, the statute must fall.

IV. ONLY FACIAL INVALIDATION CAN REMEDY THE VAGUENESS AND OVERBREADTH OF THE HATCH ACT, EVEN AS CONSTRUED BY THE COMMISSION.

The Government's claim that invalidation of Section 9(a), on its face, is not warranted is predicated on the view that the statute "as construed" comprises the Commission regulations appearing at 5 C.F.R. Part 733 (Brief 58-59). The Government does not address itself to the propriety of striking down Section 9(a) if its validity needs to be considered apart from the Commission's "authoritative construction." Accordingly, we take as conceded the propriety of facial invalidation of Section 9(a) should this Court put aside or reject the Commission's construction,[54] and we turn to the question of why the Court cannot save parts of the political activity prohibition of Section 9(a) by selective reference to the Commission's construction.

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[54] It is clear that Section 9(a), unaided by the regulation, is invalid on its face. Any judicial attempt to winnow through the 3,000 prior determinations would involve the Court in the burdensome task of considering "the abstract question whether Congress might have enacted a valid statute." *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964). Moreover, the complete absence of any "clear line" demarking protected from unprotected conduct makes judicial rewriting of Section 9(a) wholly inappropriate. See Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 862-63 (1970); *cf. Gooding* v. *Wilson*, *supra*, 405 U.S. 518, 528, 533 fn. (Burger, C.J., dissenting).

The vagueness and overbreadth of Section 9(a) inheres in the Commission's regulatory attempts at clarification and renders the regulation as invalid on its face as the statute itself. First, the Commission's 1970 regulation consistently cross-references Section 9(a):

> "All employees are free to engage in political activity to the widest extent *consistent* with the restrictions imposed by law *and* this subpart." 5 C.F.R. § 733.111(a).

Government workers are thus warned that the regulation's list of "do's" and "don't's" is not exhaustive and are referred back to underlying restrictions "imposed by law," *i.e.*, including the vague and overbroad Section 9(a). See also 5 C.F.R. § 733.111(a)(5), (a)(13) and 733.111(b). Further, the regulation's "including but not limited to" caveat which introduces the list of prohibited activities, 5 C.F.R. § 733.122(b), vitiates any claim of clarification and confirms the impression that the list of permitted and prohibited activity is illustrative only, not exhaustive or complete.

More importantly, the regulation preserves the overlap between categories of "permitted" activity and categories of "prohibited" activity that is inherent in the interplay between Section 9(a) and its statutory exceptions. Thus, "[s]oliciting votes in support of or in opposition to a partisan candidate for public office or political party office" is prohibited. 5 C.F.R. § 733.122(b)(7). A federal employee may, however, "express his opinion as an individual privately and publicly on political subjects and candidates." 5 C.F.R. 733.111(a)(7). As we have previously shown, the overlap of these conflicting permissions and prohibi-

tions renders the statute meaningless as a reasonable guide to action. The same is true of the regulation's fidelity to the statutory scheme.

In essence, the Government's position is that this Court should ratify, or remove, as it deems appropriate, the various prohibitions and permissions of the regulation. This view totally overlooks the confluent policies underlying both the "separation of powers" and "overbreadth" doctrines. The first requires that the body constitutionally responsible for legislation should legislate and limits the Court's role in construing a statute to effecting a clearly perceived, but inartfully expressed, legislative intent. But there is no basis for inferring such specific intent regarding each of the "laundry list" items in the regulation. Accordingly, the piecemeal construction which the Government seeks from this Court would produce a statute drafted by judges but never contemplated, considered or enacted by the Congress.

The function of the overbreath review complements the policy underlying the "separation of powers" doctrine. Such review insures that the legislature has in fact made the searching inquiries as to the need for regulating basic rights, and has identified compelling interests supporting each such restriction. Where it appears either that the legislature has made no such inquiry or that its inquiry has revealed only abuses controllable by narrower limitations, the overbroad statute must be invalidated on its face. Only in this manner will compelling interests be identified and legislatively precise responses be forthcoming. In short, Congress itself should be given the opportunity to legislate in this delicate area rather than be relegated to reviewing any attempted administrative or judicial patchwork rehabilitation.

CONCLUSION

For all the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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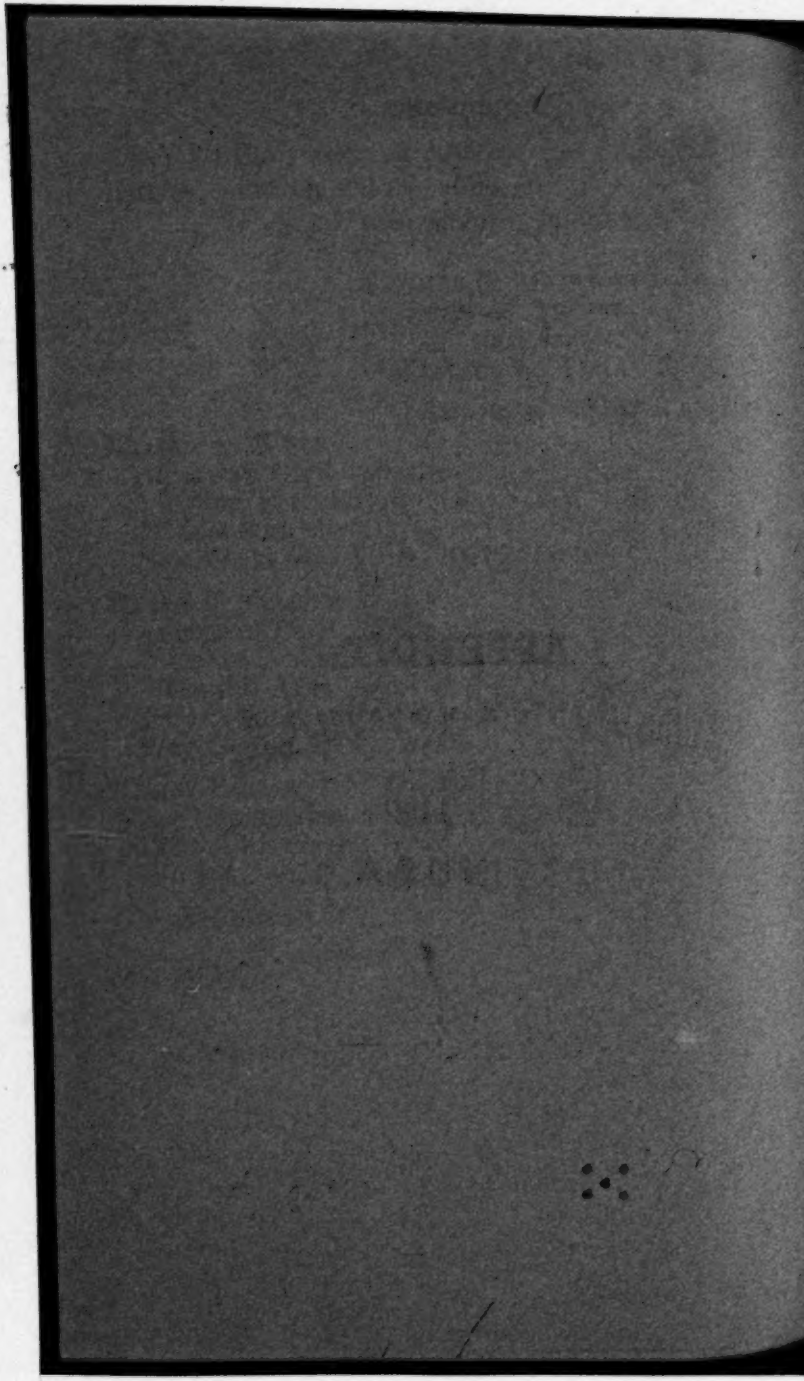
APPENDIX



APPENDIX

Introduction and Summary

The district court held unconstitutional the second sentence of Section 9(a) of the 1939 Hatch Act, now codified at 5 U.S.C. § 7324(a)(2), which prohibits federal employees from taking "an active part in political management or in political campaigns." That language was first used by Theodore Roosevelt in 1894 when he was a Civil Service Commissioner, but it then was only a suggestion. It was first made a *rule* by President Theodore Roosevelt in 1907 in Executive Order 642 which authorized that prohibition to be imposed upon federal employees in the "classified services." That order represented a radical departure from all previous civil service reform efforts, and its only statutory authority was a very general provision impliedly permitting the President to prescribe rules for the "classified" civil service.[1]

This appendix contains two parts: the first reviews pre-1907 proposals for congressional and executive control of political activity by federal employees; the second outlines the legislative history of the 1939 statute. Considered together, these two studies show that the legislative, as contrasted to the executive, branch of the Federal Government has never determined, explicitly or implicitly, that a blanket prohibition on voluntary, partisan activity, such as that here held infirm, is needed to protect

[1] Section 2(1) of the Civil Service Act of 1883, ch. 27, 22 Stat. 403; the pertinent provision is now codified at 5 U.S.C. §§ 1301, 3302 (1970). The order also recited as its authority an 1871 statute that predated the competitive civil service and empowered the President to ". . . establish regulations for the conduct of persons who may receive appointments in the civil service." Act of March 3, 1871, ch. 114, § 9, 16 Stat. 514.

either the integrity and neutrality of the federal civil service merit system or the integrity of the political process.

Instead, primary historical sources reveal:

(a) From the very first Congress in 1791, until 1939, the legislature refused to impose restraints on voluntary political activities of federal employees in the face of strong arguments that such impairments were unconstitutional.

(b) When Theodore Roosevelt served as a Civil Service Commissioner, he became frustrated by the obstacles to efficient conduct of government business that arose from a high proportion of federal employees being outside the civil service system, a condition that no longer prevails.

(c) When Roosevelt became President, he reacted to his earlier frustrations, ignored the constitutional objections that had prevailed for the previous century, and imposed a broad, sweeping ban on political activity by *classified* employees.

A. Public Employees and Political Activity Prior to Promulgation of Civil Service Rule I in 1907.*

During the century and a half preceding passage of the Hatch Act, various attempts were made by legislation and executive decree to limit the role which a federal officeholder could play in partisan politics. Throughout this period, opponents of the attempted restrictions successfully raised constitutional arguments against circumscribing the political activities of federal employees. This opposition was responsible for the defeat of nineteenth century legislative attempts to proscribe voluntary partisan political activity. Until President Roosevelt acted, public employees were generally free to engage in voluntary, partisan political activity, though forbidden to use official authority or influence to interfere with an election or to

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* Section A of the Appendix was written by Judith Hetherton, a third-year student at Georgetown University Law Center.

coerce the political behavior of other public employees or of beneficiaries of government programs.

The First Congress

Restrictions on political activities of federal officeholders were proposed as early as 1791. During the Second Session of the First Congress, Representative James Jackson introduced an amendment to a bill to levy an excise tax on distilled spirits which would have "prevent[ed] Inspectors, or any officers under them, from interfering, either directly or indirectly, in elections, further than giving their own votes, on penalty of forfeiting their offices."[2] Jackson's proposal gave rise to a debate on the constitutional problems inherent in any such restriction. Representative Vining of Delaware declared that it would "disfranchise a great number of citizens of the rights of suffrage."[3] Vining argued that it was "unconstitutional, as it will deprive them of speaking and writing their minds; a right of which no law can divest them."[4] To the assertion that the proposal was based on an English law passed in the reign of William and Mary, Representative Fisher Ames objected that "the circumstances of this country and Great Britain were not similar", and "this clause will muzzle the mouths of freemen, and take away the use of their reason."[5] The amendment was defeated 37 to 21.[6]

Jefferson's Administration

We have discovered no further legislative attempts to control the voluntary political activity of federal officeholders for almost fifty years after the first Congress.

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[2] 2 ANNALS OF CONG. 1876 (1791). Citation to the early legislative attempts to curb political activities of federal officeholders was found in Fowler, *Precursors of the Hatch Act*, 47 MISS. VALLEY HIST. REV. 247 (1960).

[3] 2 ANNALS OF CONG. 1876 (1791).

[4] *Ibid.*

[5] *Id.* at 1877.

[6] *Id.* at 1878.

During Jefferson's administration, restrictions were proposed by the Administration but, contrary to the Government's assertion (Brief, 65), apparently were not carried out. In July of 1801, Secretary of the Treasury Albert Gallatin wrote President Jefferson concerning a "rough draft of a circular to the collectors" he had prepared, and asked Jefferson whether the time was right for its release. The proposed circular, in the words of Gallatin, declared:

> "[w]hilst freedom of opinion and freedom of suffrage at public elections are considered by the President as imprescriptible rights, which possessing as citizens, you cannot have lost by becoming public officers, he will regard any exercise of official influence to restrain or control the same rights in others as injurious to that part of the public administration which is confided to your care . . . ."[7]

The circular was not aimed at voluntary, partisan political activity, but rather at the use by a federal employee of his office to interfere with the rights of others. Jefferson replied that he approved of Gallatin's draft, and had himself "proposed very early to issue a proclamation [on electioneering activity], *but was restrained by some particular considerations.*"[8] He suggested that Gallatin send out the circular "whenever . . . you shall think the public mind in

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[7] Letter of Albert Gallatin to Thomas Jefferson, July 25, 1801, in 1 H. ADAMS (ed.), THE WRITINGS OF ALBERT GALLATIN 28-29 (1879) (hereinafter cited as WRITINGS OF GALLATIN).

[8] Letter of Thomas Jefferson to Albert Gallatin, July 26, 1801, in 1 WRITINGS OF GALLATIN 29-30 (Emphasis added). The "particular considerations" to which Jefferson probably referred arose from a remonstrance by citizens of New Haven, Connecticut, against his removal of the customs collector appointed by President Adams about a week before Jefferson's inauguration. See C. FISH, THE CIVIL SERVICE AND THE PATRONAGE 32-38, 43-44 (1904) (hereinafter cited as FISH).

a proper state for this reformation . . . ."[9] Gallatin's letter to Jefferson of September 18, 1804, makes it clear that the circular was never released.[10]

Thus, the report in NILES' WEEKLY REGISTER of December 18, 1830,[11] more than twenty years after Jefferson left office, that such a circular was issued during the presidency of Thomas Jefferson, is of doubtful validity.[12] Furthermore, the notation in the Appendix to RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, published in 1899, that the circular described in NILES' WEEKLY was issued shortly after Jefferson's inauguration, is certainly erroneous, since Jefferson, himself, noted in July of 1801 that his plan to do so had been "restrained by some particular considerations."[13]

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[9] 1 WRITINGS OF GALLATIN 30.

[10] "I have uniformly been of opinion that, as it related to the principles of our government and to the reputation and popularity of the Administration, it was of importance that the officers of the federal government should abstain from any interference with public elections; and I had, as you may recollect, prepared a paragraph to that effect in my first circular to the collectors, *which you, as well as Mr. Madison, thought premature, and the subject has not been attended to since that time.*" Letter of Albert Gallatin to Thomas Jefferson, September 18, 1804, in 1 WRITINGS OF GALLATIN 209 (Emphasis added.); see FISH 44: "The circular was never sent."

[11] 39 NILES' WEEKLY REGISTER 274 (December 18, 1830).

[12] Fowler, *Precursors of the Hatch Act, supra* note 2, at 249.

[13] See note 8, *supra*. Richardson extracted the "circular" printed in his compilation from a speech delivered by Senator W. C. Rives in the Senate on February 12, 1839; he noted that "the originals could not be found." 10 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, APPENDIX 98 (1899). When Rives gave his speech, he did not indicate the source of the "circular." CONG. GLOBE, 25th Cong., 3d Sess. Appendix, 405 (1839). Representative Edward Stanly of North Carolina quoted the "circular" in the House on August 31, 1850. He erroneously cited his source as Volume 29 of NILES' REGISTER, rather than volume 39. CONG. GLOBE, 31st Cong., 1st Sess., Appendix, 1255 (1850).

The Crittenden Bill

In January of 1837, at the beginning of Van Buren's administration, Representative John Bell of Tennessee, an opposition Whig, introduced a bill to prevent the interference of officers of the United States government in elections, and termed it "a bill to secure the freedom of elections."[14] The Twenty-fourth Congress adjourned without taking action on the bill, and Bell reintroduced it in the next Congress.[15] Meanwhile, John J. Crittenden of Kentucky introduced a similar bill in the Senate.[16] The Senate Judiciary Committee, however, returned an adverse report on the Crittenden bill, calling it "unjust, unequal, impractical, impolitic, tyrannical, and unconstitutional,"[17] for every citizen had the " 'right of freely examining public characters and measures, and of free communion among the people thereon,' 'by word, message, or writing,' or in any other manner he may judge proper."[18] The debate on the Crittenden bill lasted for two weeks. In general, Democrats opposed the bill and most of the support came from the Whigs (the party out of power). John C. Calhoun argued that the bill was unconstitutional as an unlawful federal restraint on the right of suffrage, declaring that "a citizen does not cease to be one in becoming a Federal officer."[19] James Buchanan of Pennsylvania declared that

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[14] CONG. GLOBE, 24th Cong., 2d Sess. 77, 105, 111, 122, 124, 127, 144, 146; Appendix 291-96, 316-18 (1837).

[15] CONG. GLOBE, 25th Cong., 2d Sess. 190, 209 (1838).

[16] *Id.*, 3d Sess. 58-59, 179, 226 (1838-39).

[17] *Id.*, Appendix, at 160 (1839).

[18] *Id.*, Appendix, at 157.

[19] *Id.*, Appendix, at 234. Senator Calhoun went on to say:

"That a bill, containing such broad and indiscriminate provisions, transcends the powers of Congress, and violates in the officer the electoral rights of the citizen, held under the authority of his State, and guarantied [sic] by the provision of the Constitution which secures the freedom of speech to all, is too clear, after what has been said, to require additional illustration. It cannot pass without the [sic] enlarging the power of the Government by the abridgment of the rights of the citizen."

the bill was worse than the sedition law and called it a "gag law" which would clearly violate the First Amendment by interfering with freedom of speech and of the press.[20] The bill was defeated by a vote of 28 to 5.[21]

The bills were reintroduced by Crittenden and Bell in the Twenty-sixth Congress. In the Senate, the bill was not even debated,[22] and in the House it was defeated by a vote of 108 to 53.[23] When the Whigs assumed power in 1840 with the election of William Henry Harrison, Bell and Crittenden became members of his Cabinet, and any serious struggle for such legislation ceased.[24]

Webster's Circular

In his inaugural address, President Harrison expressed concern over the possible use of the appointing power to "control the whole revenues of the country" and to control "the freedom of the elective franchise," especially by the public officers themselves.[25] Accordingly, on March 20, 1841, Secretary of State Daniel Webster issued a circular to all department heads proscribing, under penalty of removal, "partisan interference in popular elections" and political assessments, so that "while the exercise of the elective franchise by the people shall be free from *undue* influences of *official* station and authority, opinion shall also be free among the officers and agents of the Government."[26] Webster's Circular did *not* proscribe voluntary, partisan political activity but was aimed only at use of official authority to manipulate public employees. Harrison died just

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[20] *Id.*, Appendix, at 203-10.

[21] *Id.* at 226.

[22] CONG. GLOBE, 26th Cong., 1st Sess. 116 (1840).

[23] *Id.* at 406. For debates on the bill in the House, see *id.* at 178, 300; Appendix, 369-77, 510-15, 635-38, 707-12, 829-35.

[24] Fowler, *Precursors, supra* note 2, at 253.

[25] 4 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 12-13 (1897).

[26] *Id.* at 52 (Emphasis added.)

two weeks after this circular was issued, and there were few other efforts at mid-century to curb the political activity of officeholders, despite official repetition of the view from time to time.[27]

Hayes' Administration

In June of 1877, the newly-elected President Hayes released what became a highly controversial Executive Order providing that "no officer should be required or permitted to take part in the management of political organizations, caucuses, conventions, or election campaigns."[28] Hayes' Executive Order was taken word for word from a letter he had sent the Secretary of the Treasury a month earlier in regard to the investigation of the New York Customs House.[29] It has been suggested that President Hayes' order was a step in his efforts "to oust Chester A. Arthur and Alonzo B. Cornell from the New York custom house which they had turned into a political machine of the most corrupt and disreputable character."[30] The eminent historians, Samuel Eliot Morison and Henry Steele Commager, describe Arthur, later President, as a "machine politician of New York, long a satellite of the lordly [Roscoe] Conkling . . . ."[31] In any event, the 1877

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[27] L. D. WHITE, THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1829-1861, at 338 (1963); FISH, 158: "The period from 1845 to 1865 marks the apogee of the spoils system in the United States: . . . the victors divided the spoils and were unashamed."

[28] 7 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 450-51 (1898).

[29] Letter of President Hayes to John Sherman, Secretary of the Treasury, May 26, 1877, in 7 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 450 (1898).

[30] 2 MORISON & COMMAGER, GROWTH OF THE AMERICAN REPUBLIC 220 (4th ed. 1954); see A. HOOGENBOOM, OUTLAWING THE SPOILS 151-78 (1961).

[31] 2 MORISON & COMMAGER, *op. cit. supra*, at 222.

order was aimed at "the kind of political activity which used a large federal establishment as a source of political power," coercing public employees to work for the party and contribute money for the maintenance of the political machine,[32] not at voluntary, partisan political activity.

The order caused great "consternation" among the federal officeholders Hayes had installed in the Post Office Department, and the Postmaster General was "flooded with inquiries as to the extent of this order."[33] Some leniency was used in its interpretation. Where officeholders had been elected as delegates to state conventions before the order was published, they were permitted to retain their positions. Although it was eventually decided that federal officeholders who were members of the national committee must choose between their two jobs, President Hayes apparently had thought, at first, that this would be unnecessary "since their political activities took comparatively little of their time."[34] This concern with the amount of time taken up by political activity seems to conflict with the idea that Hayes' order was intended to force political sterility upon federal officeholders.

President Hayes was later severely criticized by President Garfield for taking this step through executive order, "trying to effect a reform without legislative aid."[35] Garfield complained that the order forbidding federal officeholders to participate in caucuses and conventions interfered with "the lawful right of citizens," and declared

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[32] Loeb, *Public Employees and Political Activity: New Realities Require Fresh Approaches,* in 3 CPA REPORT, 210 (1968).

[33] D. FOWLER, THE CABINET POLITICIAN: THE POSTMASTERS GENERAL, 1829-1909, at 170 (1943).

[34] *Ibid.*

[35] Letter of James A. Garfield to Burke A. Hinsdale, July 25, 1880, Garfield Letter Book, James A. Garfield Papers (Manuscript Division, Library of Congress).

that, if elected President, he would ask Congress to pass a law, but only to *protect* federal officeholders from removal for political reasons.[36]

The Pendleton Act

This was accomplished under President Garfield's successor, Chester A. Arthur, by the passage of the Pendleton Civil Service Act of 1883.[37] The Act, primarily concerned with the establishment of the Civil Service Commission and *protection* of federal officeholders, did not prohibit public employees' engaging voluntarily in political activity. It prohibited only the use of official authority to coerce the political action of any person, the levying of political assessments on federal officeholders, and the solicitation of political contributions in federal buildings. Senator Pendleton called the initial legislation "a tentative effort . . . an experiment" not expected to affect more than 10% or 10,000 government employees—the clerks in the larger federal offices.[38] The Senate report on the bill made it clear that "citizens when they become office-holders do not cease to be citizens, or lose any of the rights or avoid any of the responsibilities of citizenship." [39]

The House did not even debate the bill,[40] and a leading scholar of the civil service reform movement has called the Senate debates "entirely unworthy of the occasion, hardly touching any of the serious considerations involved . . . ." [41] The Senate debates assumed a highly partisan character, with the opposition coming from the Democrats who had

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[36] *Ibid.*

[37] Act of January 16, 1883, ch. 27, 22 Stat. 403.

[38] 14 CONG. REC. 206 (December 12, 1882).

[39] S. REP. No. 576, 47th Cong., 1st Sess. xii (1882).

[40] 14 CONG. REC. 860-67 (January 4, 1883).

[41] FISH, 218.

been out of power for twenty-two years and feared that the new legislation would give life tenure to Republican appointees. The only mention of the bill's effect on the voluntary, partisan political activity of officeholders was made by Senator Brown of Georgia, a Democrat. He pointed out that the legislation allowed federal employees within its scope to "be as active as they choose."[42] There was a great deal of discussion of the possibility of prohibiting not only the solicitation, but also the giving of political contributions by federal employees.[43] Such a prohibition was objected to as an unconstitutional restriction, however, and all amendments proposing such prohibition were rejected.[44]

The first two rules promulgated by the Civil Service Commission under the Act were directed at interference with elections and coercion of employees in the public service for political party purposes.[45] In its first report, the Commission explained: "the first assert[s] the right of the private citizen to freedom from the coercion of executive officers, and the second . . . the right of such officers to freedom from the coercion of parties and factions."[46] This would leave public employees free to "discharge those political duties and co-operate in manly and honest ways within their party, as becomes every citizen of a republic."[47]

In an early construction of the Pendleton Act, Postmaster General Walter Q. Gresham found that he could

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[42] 14 CONG. REC. 277 (December 14, 1882).

[43] *Id.* at 621-30 (December 23, 1882), 635-44 (December 27, 1882).

[44] *Id.* at 630, 642, 643.

[45] FIRST ANN. REP. OF THE CIVIL SERVICE COMM'N 45 (1884).

[46] *Id.* at 8.

[47] *Id.* at 31.

advise his postmasters that they would now be free to serve on political committees, as long as these committees did not receive contributions from federal officeholders.[48]

The first civil service rules promulgated by the President under the Act provided for three classified services: departmental, customs, and postal.[49] The classified services, the only parts of the executive civil service over which the Civil Service Commission exercised any authority, included, as of July 1, 1883, only about 10.5% of the executive civil service, or 13,780 positions out of a total of 131,208 positions.[50]

In 1886 the force of the Commission's rules was superseded by a new definition of the effect of the Pendleton Act on the political activities of officeholders in the form of a circular issued by President Cleveland to heads of departments.[51] The 1886 circular permitted officeholders wider participation in political activities than had President Hayes' circular of 1877, because President Cleveland made it clear that he was not issuing a blanket condemnation of

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[48] Letter of Walter Q. Gresham to W. H. Hart, August 8, 1884, Walter Q. Gresham Papers (Manuscript Division, Library of Congress).

[49] FIRST ANN. REP. OF THE CIVIL SERVICE COMM'N 45-46 (1884). The term "classified service" is generally used to refer to that portion of civil service positions wherein removal for political reasons is forbidden. P. VAN RIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE 99 n. 6, 207 (1958).

[50] CIVIL SERVICE COMMISSION, THE CLASSIFIED EXECUTIVE CIVIL SERVICE OF THE UNITED STATES GOVERNMENT, at 4 (1932) (in the Civil Service Commission's Archives Collection). See also BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957, at 710 (1957). All federal employment statistics for the period before World War I "are at best approximate and can be safely used only to show a general trend." VAN RIPER, *op. cit. supra* note 49, at 203 n. 86.

[51] 8 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 494-95 (1898).

political activity but rather he was aiming at "the use of their *official* positions in attempts to control political movements in their localities." [52] This idea was repeated many times in the letter, with President Cleveland referring to "official positions," "official duty," "official place," "official coercion," and it was clearly spelled out in the following paragraph:

> "Individual interest and *activity* in political affairs are by no means condemned. Officeholders are neither disfranchised nor forbidden the exercise of political privileges, *but their privileges are not enlarged nor is their duty to party increased* to pernicious activity by officeholding." [53]

The Cleveland circular became the basic rule governing the political activities of federal officeholders until the issuance by President Theodore Roosevelt in 1907 of Civil Service Rule I, the immediate predecessor of the Hatch Act.

Roosevelt's Rule

On June 3, 1907, President Theodore Roosevelt issued Executive Order No. 642 pursuant to his somewhat vaguely expressed statutory authority [54] to prescribe rules for the classified civil service.[55] The Executive Order was incorporated in Civil Service Rule I on June 15, 1907.

The 1907 Rule I was a radical departure from previous approaches taken by the Congress, the Presidents, or the Commission. It prohibited all persons in the classified service from taking an "active part in political manage-

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[52] *Ibid.* (Emphasis added.)

[53] *Ibid.* (Emphasis added.)

[54] Act of January 16, 1883, ch. 27, § 2(1), 22 Stat. 403, now codified at 5 U.S.C. §§ 1301, 3302 (1970). See 1a, n. 1, *supra.*

[55] TWENTY-FOURTH ANN. REP. OF THE CIVIL SERVICE COMM'N 104 (1907).

ment or in political campaigns."[56] The only qualification was that the prohibition was restricted to the classified service, which in 1907 consisted of approximately 196,918 government employees.[57] Promulgation of this Rule "shifted the emphasis from the dangers of coercion from above to a policy of enforcing neutrality at the lower levels of the public service."[58] Not before Roosevelt's time had the Commission acted to proscribe voluntary, partisan political activity.[59] Why, after more than 100

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[56] *Id.* at 55, 104.

[57] *Id.* at 1-2. This represented approximately 58% of the estimated 337,000 employees in the federal service in 1907. *Ibid.*

[58] Loeb, *Public Employees*, 3 CPA REPORT, 211.

[59] Volume I of the Civil Service Commission's *Political Activity Reporter* contains a subject-matter index of decisions by the Commission since 1883, listing 64 categories of proscribed or questionable political activity. Eight of these categories concern unquestionably proscribed activity such as coercion of federal employees, levying of political assessments, solicitation of political contributions, discrimination in employment for political reasons. Of the remaining 56 categories, 30 contain no pre-1907 decisions. The remaining 26 categories contain a total of 36 decisions. An analysis of these 36 cases shows that in 29 cases the Commission either took no action or was concerned with multiple violations including at least one of the obviously proscribed activities listed above. Of the seven remaining cases, six involved alleged violations of President Roosevelt's 1902 letter (*infra*, pp. 17a-18a) the predecessor of his 1907 Rule. Only one case could be found that, prior to 1902, condemned voluntary partisan political activity, and that case involved a secretary of the customs board of civil service examiners. Index # 18, *Selleck*, 15 AR 264 (1898). He had served on a committee in a Republican county convention and had been appointed a delegate to other political conventions. When Selleck's attention was called to a Commission guideline forbidding such activity by members of its board of examiners, he chose to resign his Commission position in order to continue his political activity.

years of government service without such a restriction, was all voluntary partisan political activity then circumscribed? Perhaps the answer can best be found in the experiences of the man who promulgated the Rule.

Theodore Roosevelt had served as Civil Service Commissioner from 1889 to 1895. In the Eleventh Report of the Commission, for the fiscal year 1894, he authored a paragraph entitled "Offensive Partisanship" setting forth his views on political activity of officeholders, while admitting that "no rule about what is deemed proper partisanship in the classified service has ever been authoritatively construed, and the Commission has no power whatever to construe such a rule." [60] Roosevelt went on to state what his idea of such a rule would be.

> "A man in the *classified* service has an entire right to vote as he pleases, and to express privately his opinions on all political subjects; but he should not take any active part in political management or in political campaigns . . . ." [61]

The proscription contained in the last phrase is identical to that of the 1907 Rule and of the 1939 statute. The purpose of the suggested rule was the same as that of all previous guides to political behavior of officeholders: to prevent a federal officeholder "from turning his official position to the benefit of one of the parties into which [the] whole public is divided . . . ." [62] But the blanket proscription was as new as the thought that "in no other way can this [use of official position to benefit a party] be prevented." [63] The only explanation for this broad prohibition of political activity

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[60] ELEVENTH ANN. REP. OF THE CIVIL SERVICE COMM'N 20-21 (1894).

[61] *Ibid.* (Emphasis added.)

[62] *Ibid.*

[63] *Ibid.*

by federal officeholders was Roosevelt's statement that it was necessary "for precisely the same reasons that a judge, an army officer, a regular soldier, or a policeman is debarred from taking such active part" [64] in political management or campaigns.

When Theodore Roosevelt wrote that paragraph, he had served on the Civil Service Commission for five years. A study of his experience on the Commission, along with his writings, might, therefore, be expected to provide some insight into his reasons for believing in the necessity of such a broad proscription.

While Roosevelt was Commissioner, no more than 25% or approximately 45,000 of those in the civil service were in the classified service and thus subject to the enforcement jurisdiction of the Commission.[65] As Commissioner, much of his time had been spent investigating cases and making recommendations which department heads ignored, and shortly after completing his service on the Commission, Roosevelt expressed frustration with this lack of enforcement authority.[66]

In his *Autobiography,* Roosevelt condemned the evils of patronage and the spoils system. One of his major concerns was "the lack of continuous [political] activity on the part of . . . good citizens" which went hand-in-hand with the "ever-present activity of those who have only an evil self-interest in political life." [67] Roosevelt felt that since the spoils system had "become habitual and traditional in American life . . . [and] ingrained in the mind of the average American," it was necessary, in order to uproot the system "gradually to change the average citi-

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[64] *Ibid.*

[65] According to the CLASSIFIED EXECUTIVE CIVIL SERVICE, *supra* note 50, at 33, there were approximately 180,000 positions in the executive civil service in 1894. Of these, only 45,821, or 25.5% were positions subject to examination.

[66] See T. ROOSEVELT, ADMINISTRATION—CIVIL SERVICE 8-9 (1897).

[67] T. ROOSEVELT, AUTOBIOGRAPHY 147 (1919).

zen's mental attitude toward the question . . . ." [68] Roosevelt apparently felt this change in attitude could be accomplished only by disassociating federal officeholders entirely from active politics:

> ". . . we ought to make it clear as a bell that the business of serving the people in one of the ordinary ministerial Government positions, which have nothing to do with deciding the policy of the Government, should have no *necessary* connection with the management of primaries, of caucuses, and of nominating conventions." [69]

Roosevelt's approach of complete severance was, therefore, designed to meet the peculiar situation in the history of civil service reform at the turn of the century when the spoils system still controlled placement in 75% of federal offices.

But even Roosevelt saw the difficulty in applying any hard-and-fast rule to the entire civil service as contrasted to its classified part. In a letter to the Commission written in 1902 during his first term as President he noted:

> "After 16 years' experience [in interpreting Cleveland's 1886 circular] it has been found impossible to formulate in precise language any general construction which shall not work either absurdity or injustice. Each case must be decided on its merits. For instance, it is obviously unwise to apply the same rule to the head of a big city Federal office, who may by his actions coerce hundreds of employees, as to a fourth-class postmaster in a small village who has no employees to coerce, and who simply wishes to continue to act with reference to his neighbors as he always has acted." [70]

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[68] *Id.* at 145-46.

[69] *Id.* at 148 (Emphasis added.)

[70] TWENTIETH ANN. REP. OF THE CIVIL SERVICE COMM'N 125 (1903).

Roosevelt's solution was to distinguish between officeholders in the classified service, and those in the unclassified service.

> "After my experience under two Presidents . . . I had become convinced that it was undesirable and impossible to lay down a rule for public officers not in the classified service which should limit their political activity as strictly as we could rightly and properly limit the activity of those in whose choice and retention the element of political considerations did not enter . . . ." [71]

The irony of this approach was, of course, that the restricted employees in the classified service comprised only about 50% of federal officeholders at that time, and by 1908 encompassed the "fourth-class postmaster in a small village who has no employees to coerce" but generally *not* the "head of a big city Federal office, who may by his actions coerce hundreds of employees . . . ." [72]

But ironical or not, Theodore Roosevelt's blanket prohibition on political activity of government employees became law, first by executive fiat, and then thirty-two years later by congressional action taken without examination or consideration of the underlying premises.

B. The Legislative History of the Hatch Act of August 2, 1939

The Sheppard Committee Report

The Hatch Act arose from events surrounding various elections in 1936 and 1938. From around the country came charges that Federal relief funds were being used by officials to influence elections. With an eye toward remedial legislation, the Senate established, May 27, 1938, a special

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[71] *Ibid.*

[72] *Ibid.* The first step toward inclusion of fourth-class postmasters was taken on November 30, 1908, when the positions of fourth-class postmasters in the Northern and Eastern states were made competitive. TWENTY-FIFTH ANN. REP. OF THE CIVIL SERVICE COMM'N 126 (1908).

five-member bi-partisan committee to investigate the charges.[73] The Senate subsequently expanded the authority of the Committee to consider all possible inappropriate political acts by officials.[74] This Committee, chaired by Senator Morris Sheppard of Texas, published its extensive findings on January 3, 1939.[75] The Sheppard Committee Report constituted the only investigation or fact finding underlying the Hatch Act.

The Sheppard Committee Report consists of two parts: Part I, 65 pages long, contains a summary of findings and legislative recommendations; Part II, 378 pages long, sets out summaries of case investigations.

The substance of the Committee's Report can be summarized by its classification of the hundreds of complaints it had received:

> "(1) Irregularities in registration and voting; (2) abuse of the Senate franking privilege; (3) excessive expenditures and unreported expenditures; (4) solicitation or assessment of Federal officials and employees either by Federal officials and employees or others for contributions in behalf of a senatorial candidate; (5) solicitation or assessment of State officials and employees receiving any part of their pay from money appropriated by Congress for such contributions; (6) intimidation or coercion by Federal officials and employees or others in behalf of a senatorial candidate; (7) use of funds appropriated by Congress in behalf of a senatorial candidate; and (8) promising of employment in private industry in exchange for the promise to vote for certain candidates." [76]

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[73] S. Res. 283, 75th Congress, 3d Sess. (1938).

[74] S. Res. 290, 75th Congress, 3d Sess. (1938).

[75] *Investigation of Senatorial Campaign Expenditures and Use of Governmental Funds: Report of the Special Committee to Investigate Senatorial Campaign Expenditures and Use of Governmental Funds in 1938*, S. REP. No. 1, 76th Cong., 1st Sess. (1939) (Hereinafter cited as the Sheppard Committee Report).

[76] Sheppard Committee Report, Pt. I, pp. 3-4.

It is most striking that the Sheppard Committee Report contained not one finding that the effectiveness of the federal work force was being compromised by voluntary, partisan activity by its employees. No category relates to problems arising from the freedom of government employees not subject to Civil Service Rule I to engage voluntarily in partisan political activity.

Yet, the Report's summary of cases investigated shows that the Sheppard Committee did consider instances of voluntary, partisan activity by such employees. In every such instance that we have found, the Committee closed the investigation with the determination that such activity did not constitute grounds for criticism.[77]

The ultimate finding of the Sheppard Committee Report related to the impact of various "New Deal" relief programs on the federal election process. These programs had vastly increased the number of federal employees and recipients of government benefits. Projects such as the WPA and CCC were designed to put needy persons on the public payroll, but these employees were not members of the classified or competitive civil service and thus were not governed by Civil Service Commission Rule I and its manifold determinations prohibiting partisan political activity. The common feature of the abuses uncovered by the Sheppard Committee was coercion or intimidation by government officials of employees or relief recipients to change party affiliation or to support party interests. When such coerced partisan support took financial form, taxpayers' money was thereby channeled into partisan political activity away from relief of the needy, and the political process was thus corrupted. The Committee found "that funds appropriated by Congress for the relief of those in

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[77] *Alleged W.P.A. Political Activity in Owen County, Indiana*, Sheppard Committee Report, Pt. II, p. 47; *Gilbert A. Dailey, id.* at 111; *Frank S. Revell, id.* at 134.

need and distress have been in many instances diverted from these high purposes to political ends." [78]

Consonant with these findings, the Sheppard Committee recommended a number of amendments to Title 18 of the United States Code to make such practices subject to criminal penalties. The Sheppard Committee recommendations are narrowly drawn and precisely directed at the evils discovered. Most significantly, they include *no* recommendation or finding that prohibition of any voluntary partisan political activity is needed to protect the integrity of the civil service or the political process.

Senate Passage of the Hatch Act

Less than two months after the Sheppard Committee Report was filed, Senators Sheppard, Hatch, and Austin jointly introduced S. 1871, "an Act to prevent pernicious political activities." [79] Ten days after its introduction, and without hearings, the Committee on Privileges and Elections sent the bill to the Floor accompanied by a two-page report recommending enactment.[80] The entire discussion of Section 9 in the two-page Committee report follows:

> "Section 9 is a restatement of the law now in effect as regards civil-service employees. It provides in almost the exact language of the civil-service rule that it shall be unlawful for any person employed in any administrative or supervisory capacity of any agency of the federal government to use his official authority for purpose of interfering with an election or affecting the result thereof.
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> "In effect, this is also a restatement of the provisions of section 2 of the act, except it includes an additional

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[78] Sheppard Committee Report, Pt. I, p. 39.

[79] 84 CONG. REC. 2935 (1939).

[80] S. REP. No. 221, 76th Cong., 1st Sess. (1939).

> penalty—that of removal from the position or office held by him. It also prohibits such persons from taking active part in political management or in political campaigns just as the civil-service Rules now provide."[81]

When the bill reached the Senate floor on April 13, 1939, it was passed by unanimous consent after a few amendments not pertinent to the issues raised by this case.[82] Thus, up to the time that the Hatch Act passed the Senate, there was no consideration for prohibiting voluntary, partisan, but non-coercive political activity.

The Senate bill was referred to the House Committee on the Judiciary. That Committee held no hearings but, on July 5, 1939, reported the bill out favorably with amendments, describing its purpose as follows:

> "This proposed legislation prohibits interference with the right of every person to vote as he may choose at elections for federal offices, including the office of presidential elector."[83]

Consistent with this objective, the House Committee deleted Section 9's prohibition against voluntary, partisan activity by administrative or supervisory personnel, saying:

> "Section 9 forbids any person in any administrative or supervisory capacity by the federal government to use his official authority or influence for the purpose of

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[81] *Id.*, at 2.

[82] 84 CONG. REC. 4191-92; the principal amendments removed primary elections from the reach of the bill, apparently because of doubts as to the constitutional power of the Congress to regulate such elections. *Cf. United States* v. *Gradwell*, 243 U.S. 476 (1917).

[83] H.R. REP. No. 1028, 76th Cong., 1st Sess. 1 (1939).

interfering with an election or affecting the results thereof, upon pain of removal from his office. The Committee amendment strikes out the provision that such persons shall take no active part in political management or political campaign. *This provision of the Senate Bill is very far-reaching and contains no exceptions.*" [84] (Emphasis added.)

Thus, the first time any committee of Congress explicitly considered whether it was necessary to restrict voluntary, partisan activity, it rejected such a restriction as too "far-reaching," even though limited to administrative or supervisory personnel. The only point of agreement on Section 9 between the House and the Senate was that the remaining prohibitions of Section 9—as to misuse of official authority and influence—should apply only to administrative or supervisory personnel.

At first, the House, over opposition led chiefly by Representatives Hobbs of Alabama and Adler of New York, rejected its Judiciary Committee's proposed deletion of the ban against the voluntary, partisan activity.[85] This left intact the Senate version of Section 9, with its limited ban on voluntary, partisan activity by administrative or supervisory personnel.

Representative Hobbs then offered an amendment to strike the ban against voluntary, partisan activity by administrators or supervisors.[86] The House adopted Rep. Hobbs' amendment by a nearly unanimous vote.[87] This eliminated any ban on voluntary, partisan activity.

Representative Dempsey then offered a substitute amendment for Section 9 which retained the prohibition against

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[84] *Id.* at 2.

[85] 84 CONG. REC. 9621.

[86] *Id.* at 9622.

[87] *Id.* at 9625.

partisan political activity and extended its application to *all* officers or employees of the executive except the President, Vice President, his staff, and certain other senior policy officers.[88] This amendment was enacted into law after further parliamentary maneuvering. First, Hobbs sought to protect his previous, successful amendment by proposing to delete the Dempsey amendment's prohibition of partisan political activity, contending that such a restriction of protected freedoms was not necessary to achieve the Act's legitimate goals:

> "Mr. Hobbs. Every single solitary pernicious activity is interdicted by the term of this bill. Every abuse of power, bribery, coercion, threats, intimidation, solicitation of funds from relief workers, or from anybody on relief, every exercise of official authority or influence, all of those things you cry out against are interdicted by this bill already. But when you come to this section of the bill you say that no matter how honestly a Federal officeholder in his supervisory or administrative capacity may conduct himself, no matter how clean his hands may be, he cannot participate in political management or campaigns. No matter how scrupulously he may avoid any abuse of his rights of free speech and liberty of action guaranteed by the Constitution. If you do this thing, you not only violate the Constitution, you not only violate every natural right of every citizen in the United States, but by doing this you divest him of citizenship and you have set up the process of disintegration, whereby the Government 'of the people, by the people, and for the people' will have begun to perish from the earth.
>
> "I beg of you that you leave it not only to the penal provisions under this act, but also to the pains and penalties of the Corrupt Practices Act, to curb abuses

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[88] *Ibid.*

of the types feared, and not deny the fundamental rights of American citizens. [Applause]." [89]

When Representative Dempsey defended his amendment he failed to suggest a single vice not already amply covered by the bill's anti-coercion and intimidation provisions:

"MR. DEMPSEY. Do you want people who have been indicted, threatened, and coerced, as they have been in the past? Do you want a supervisor on W.P.A. projects taking part in political campaigns and putting additional trucks on the job in name only in order that he may pay himself back for the money extracted from him by politicians." [90]

Similarly, Representative Ramspeck, a supporter of the Dempsey amendment, was unable to specify how the Act's objectives required more than the prohibitions of Sections 1-8:

"MR. RAMSPECK. It is a question of what you believe in. I know the gentleman does not agree with me about it, but I believe if we are going to maintain good government in this country and have a democratic form of government that is to survive, we have to remove the rank and file employees from beings pawns in the political game. That is what I believe. [Applause]. The gentleman has a right to his own opinion and of course I do not quarrel with him about that. But I believe that the thing that is going to destroy this Nation, if it is destroyed, is political corruption, based upon traffic in jobs and in contracts, by political parties and factions in power." [91]

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[89] *Id.* at 9622-23.

[90] *Id.* at 9605.

[91] *Id.* at 9616.

There is no further explanation in the debates demonstrating why or how the prohibitions of Sections 1-8 were inadequate.

The Hobbs amendment to the Dempsey amendment was defeated, and the Dempsey amendment passed on July 21.[92] Two days later the Senate agreed, again without debate, to the House revisions of S. 1871.[93] Along with the rest of the Hatch Act, Section 9 became law.

It is far from clear why the House (1) rejected its Judiciary Committee's deletion of the ban on partisan political activity, (2) then agreed nearly unanimously to delete the prohibition against partisan activity, thus effectively reinstating the Judiciary Committee's version of Section 9; (3) then, by refusing to adopt the Hobbs amendment to the Dempsey amendment, repudiated its second action and, indeed, went beyond the Senate version by extending the ban on voluntary, partisan activity beyond administrative and supervisory personnel. The debates do not disclose the reasons for this vacillation.

There was no debate on the Dempsey amendment's extension of the partisan political activity ban from administrative and supervisory employees to "any employee of the executive branch of the government" nor was there any debate on the wisdom of Civil Service Commission Rule I which Section 9 followed, even though Rule I was promulgated by Executive Order, rather than by act of Congress. Nor was there any explanation why the broad prohibition was necessary to remedy the evils described in the Sheppard Committee Report.

One significant fact emerges from analysis of the debates. The only body that debated, the House, did not point to any wider evil or greater threat than those brought

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[92] *Id.* at 9631.

[93] *Id.* at 9674.

to light by the Sheppard Committee: abuse of federal office and of relief programs through official, partisan coercion. Accordingly, no one answered Representative Hobbs' argument against the Act's overbreadth. The debates simply do not show that Congress was aiming at any problem that could not be controlled by legislation directed at the particular abuse itself. Thus, the legislative history of the Hatch Act compels the conclusion that the Congress failed to make any finding that the abuses it saw could not be remedied by measures less restrictive than a blanket prohibition against constitutionally protected, voluntary, partisan activity.